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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

CHARLES E. YATES, ET AL.,
Plaintiffs in Error,
vs.
JONES NATIONAL BANK,
Defendant in Error.
No. 230

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
UTICA BANK, *Defendant in Error.*
No. 231

CHARLES E. YATES, ET AL.,
Plaintiffs in Error,
vs.
THOMAS BAILEY, *Defendant in Error.*
No. 232

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
BANK OF STAPLEHURST,
Defendant in Error.
No. 233

ERROR TO THE SUPREME COURT OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR

JOHN J. THOMAS,
RICHARD S. NORVAL AND
WILLIAM B. C. BROWN,
Attorneys for Defendants in Error.

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ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR.

History of Cases.

These four suits were instituted in the District Court of Seward County, Nebraska, February 25, 1895, by the Jones National Bank, The Bank of Staplehurst, The Utica Bank and Thomas Bailey, separately, against Charles W. Mosher, Richard C. Outcalt, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Rollo O. Phillips and David E. Thompson, except that Mr. Thompson was made defendant only in the cases of The Jones National Bank and the Bank of Staplehurst.

Defendant Stuart having failed to answer, judgments were rendered against him, which were affirmed by the State Supreme Court in Stuart v. Bank of Staplehurst, 57 Neb. 576.

Defendant Phillips died before the trial in the State Court, but the action as against him was not revived.

Defendants Hamer and Walsh also died while the cases were pending in the State Court and the actions were revived in the names of Louisa Hamer, Administratrix, and George W. and Warren W. Walsh, Administrators, respectively.

Trial was had during May and June, and on July 21, 1902, judgments were rendered in favor of defendant Walsh, and against defendants Mosher, Outcalt, Thompson, Yates, and Hamer, Administratrix.

All those against whom judgments were entered, prosecuted error proceeding to the Supreme Court of the State, where the judgments were affirmed; but only Thompson, Yates and Hamer, Administratrix, have prosecuted error proceedings to this court.

On March 29, 1895, the defendants removed the cases to the Circuit Court for the District of Nebraska, (Jones Rec. 66), but on July 27, 1897, on motion of plaintiffs, they were remanded to the State Court (id. p. 79) for the reason that the petitions did not present a federal question. See opinion in Bailey v. Mosher, 74 Fed. Rep. 15.

Amended petitions were filed May 3, 1897, (id. 71) which were again amended by interlineation on March 6, 1899, (id. 80) and on April 15, 1899, the cases were again removed to the Federal Court, (id. 81).

Plaintiffs motions to remand were overruled by the Circuit Court, but on error to the Circuit Court of Appeals, the order was reversed and the cases ordered remanded. (See opinion in Jones v. Mosher 107 Fed. Rep. 561).

The cases were accordingly remanded on May 6, 1901, (Jones Rec. p. 84) and trial had in the State Court as above stated.

History of Bank.

For some years prior to June, 1883, Marsh Bros., Mosher & Co. were doing a collecting and banking business at Lincoln, Nebr., the business consisting mostly in handling the paper of certain companies engaged in manufacturing harvesters, etc., at Sycamore, Illinois.

In June, 1883, the Marsh National Bank was incorporated with a purported capital stock of $100,000.00, but no money actually went into the bank, the assets and liabilities of Marsh Bros., Mosher & Co., having been transferred, en masse, to the Marsh National Bank.

It appears quite clearly that the Bank was, at its inception, insolvent, and its history up to the time it closed its

doors presents a series of the most flagrant cases of corruption and dishonesty known to the annals of banking.

In May, 1884, its name was changed to the Capital National Bank, and it was at this time the defendants became directors; and they so continued until it closed its doors, January 21, 1893.

At the time of its failure, its liabilities amounted to $1,761,062.38, while its assets (exclusive of the stock assessment) amounted to $180,494.52.

While the bank was a going concern, the directors published from time to time, in the newspapers of the City of Lincoln, Nebraska, statements of the financial condition of the Bank, showing it to be not only solvent, but prosperous, when in fact, it was at all times insolvent.

They also published in such newspapers a card, giving the names of the directors and representing the Bank as having a capital stock of $300,000.00 when in fact it had none. (Bill of Ex. p. 25)

Relying upon these representations, and believing them to be true, the plaintiffs deposited their money in the Bank and lost it, and thereupon brought these suits against the directors as individuals for fraud and deceit.

It is unnecessary to repeat the contention of defendants, as it is very ably set forth in two briefs filed in their behalf.

Twelve assignments of error are relied upon for reversal.

We believe it will avoid prolixity to discuss generally the principles involved in the consideration of these cases, rather than review the assignments seriatim.

Argument.

I. **An action for deceit may be maintained against the**

directors of a bank by depositors induced to become such by false representations or statements of the bank's condition made by such directors.

(a) The directors of a bank who publish false statements of its condition thereby represent that the matters of fact therein stated are within their personal knowledge, and, if they have no such knowledge, the statement is knowingly false.

(b) While it is said that to constitute actionable fraud there must be scienter, it is universally conceded this does not mean actual knowledge, and where the representation is of a fact, made by one in position to know, whose duty it is to know, or where it would constitute gross negligence not to know, such knowledge will be conclusively presumed.

II. Section 5239 Rev. St. U. S. neither abrogates nor modifies the common-law action of deceit.

III. The petitions charge the common-law action of deceit, and are not based upon violations of the national banking act.

IV. The cases were tried as actions for fraud and deceit, and not for negligence or malfeasance in office.

V. Although the petitions state matters which would constitute a cause of action under the national banking act (which we deny) they clearly state a common-law action of deceit, which, being supported by the evidence, is sufficient to sustain the judgments.

VI. The defendants have been denied no title, right, privilege or immunity conferred by the constitution, or any statute or treaty of the United States.

VII. *(res judicata) The decision in Bailey v. Mosher, (63 Fed. 488) was not a bar to this action.

I. AN ACTION FOR DECEIT MAY BE MAINTAINED AGAINST THE DIRECTORS OF A BANK BY DEPOSITORS INDUCED TO BECOME SUCH BY FALSE REPRESENTATIONS OR STATEMENTS OF THE BANK'S CONDITION MADE BY SUCH DIRECTORS.

(a) THE DIRECTORS OF A BANK WHO PUBLISH FALSE STATEMENTS OF ITS CONDITION THEREBY REPRESENT THAT THE MATTERS OF FACT THEREIN STATED ARE WITHIN THEIR PERSONAL KNOWLEDGE, AND IF THEY HAVE NO SUCH KNOWLEDGE, THE STATEMENT IS KNOWINGLY FALSE.

(b) WHILE IT IS SAID THAT TO CONSTITUTE ACTIONABLE FRAUD THERE MUST BE SCIENTER, IT IS UNIVERSALLY CONCEDED THIS DOES NOT MEAN ACTUAL KNOWLEDGE, AND WHERE THE REPRESENTATION IS OF A FACT, MADE BY ONE IN POSITION TO KNOW, WHOSE DUTY IT IS TO KNOW, OR WHERE IT WOULD CONSTITUTE GROSS NEGLIGENCE NOT TO KNOW, SUCH KNOWLEDGE WILL BE CONCLUSIVELY PRESUMED.

The case of Prescott v. Haughey, 65 Fed. Rep. 653, is

*(The plea of res judicata applies only to the case of Thomas Bailey.)

one that is on all fours with these cases. Baker, J., in a very able opinion reviews the authorities and discusses the principles involved. It seems to us his reasoning is unanswerable and we especially urge a careful reading of his opinion.

The syllabus is as follows:

"Directors of a national bank, who, in the pretended performance of duties imposed upon them by law, use their official station to make false and fraudulent representations, which are believed and acted on by others, are liable to one defrauded thereby in a common-law action of deceit, and the right to maintain such action is not precluded by the liability imposed in the national banking law for violation of its provisions. * * *

"A complaint alleged that defendants, directors of a national bank, published advertisements, statements, and reports representing that the bank was solvent and prosperous, knowing such representations to be false and the bank to be hopelessly insolvent, intending thereby to deceive the public and plaintiffs; that plaintiffs had no knowledge that said representations were false, and the bank insolvent, and, relying on said representations, were thereby induced to deposit with the bank a certain sum; that said representations deceived plaintiffs, and by reason of the premises they had been damaged in said sum. Held, that the representations charged, if made by the directors under color of their office, were entirely outside of their official duties, and the cause of action stated was a common-law cause of action for deceit, presenting no federal question which could sustain a removal of the cause from a state court. Bailey v. Mosher, 11 C. C. A. 301, 63 Fed. 188; distinguished."

On page 655 of the opinion, Baker, J., says:

"It is apparent that the cause of action does not sound in tort for any acts of misfeasance or non-feasance on the part of the defendants, as directors, causing damage or

loss to the bank. It does not appear that the bank has suffered any injury by reason of the fraudulent acts complained of. On the contrary, it became possessed of $35,000 of the moneys of the plaintiffs as the direct and intended results of the false and fraudulent representations of the defendants. Hence the bank, if not benefited, certainly was not injured by the fraudulent acts of its directors. It is therefore certain that neither the bank, nor the receiver who now represents it, could maintain any action for the wrongs complained of. Unless the plaintiffs can maintain an action for the redress of the injury which they alone have suffered, the defendants cannot be made answerable for their false and fraudulent conduct. **It would be a matter of just reproach if the law were so impotent as to afford no redress to a party who had been deprived of his money or property by false or fraudulent representations.** The fraudulent representations charged in the complaint, if made under color of their office, were entirely outside of the official duties of the directors. Neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements, statements, and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon such officers any authority to commit frauds of the character complained of. These directors have used their official stations to enable them to perpetrate a fraud on the plaintiffs entirely outside of the legitimate scope of their duties. It could, in no event, become a part of their duties to procure money to be deposited in the bank by false and fraudulent representations. * * * In the case in hand the plaintiffs seek to recover damages for an injury which could in no event give a right of action to the bank or to its receiver, or to any other creditor than the plaintiffs. If the frauds complained of do not give a right of action to the plaintiffs, the defendants will entirely escape liability for the fraudulent representations, as shown by the complaint, of the most flagitious character. I do not believe the law is justly obnoxious to such a reproach. In my opinion, the settled doctrine of the law is that if, in the pretended performance of duties imposed upon them by law, the directors of a bank use their official station to

make false representations, which are believed and acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby, and that the liability provided for in the National Banking Act cannot be deemed to preclude the right to maintain a common-law action of deceit for such false and fraudulent representations."

The existence of the common-law remedy for deceit is recognized in Gerner v. Thompson, 74 Fed. Rep. 125, the syllabus of which is as follows:

"An action against the directors of a national bank under the provisions of Rev. St., Sec. 5239, can be maintained only by a receiver of the bank; and an action by a private individual against such director for damages arising from the making of false reports, or other violations of the National Banking Act can only be maintained as an action at the common-law in the nature of an action of deceit."

The decision in Bailey v. Mosher, 63 Fed. Rep. 488, while it held the petition in that case to declare upon the violation of Sec. 5239, concedes the existence of the common-law remedy of deceit. Referring to the opinion in that case, Shiras, J., in Gerner v. Thompson, 74 Fed. Rep. 126, says:

"The effect of this decision, if I correctly apprehend its meaning, is that rights of action created by the provisions of the Banking Act are to be deemed part of the assets of the corporation, and, as such, are enforceable only by the receiver in case the bank has become insolvent; but rights of action arising at the common-law, and growing out of transactions not injuriously affecting the capital stock or the interests of the shareholders at large, may be enforced by anyone suffering special injury thereby."

In Merchants National Bank of Hillsboro v. Thomas,

28 W. L. B. (Ohio) page 164, it was held that "the plaintiff is entitled to recover in an action for deceit the amount of his damages from those officers who fraudulently signed said reports." The opinion in that case very ably discusses the principles involved.

Speaking of it, the Supreme Court of Nebraska, in Gerner v. Mosher 58 Neb. 146, says it "is enforced by so clear and so able an opinion that it logically carriers more weight than many decisions of higher courts."

Solomon v. Bates, 118 N. C. 312; 24 S. E. 478, was an action against directors of a bank for false representations as to its financial condition. The facts are identical except that the defendants were directors of a state bank instead of a national.

It holds not only that the directors are liable, but that it is **not necessary that they shall know the false statements to be untrue,** and that they are liable for damages sustained by anyone dealing with a corporation relying on the truth of such official reports.

To quote from the opinion of Clark, J., id 480:

"Indeed, the directors are liable for injury caused by relying upon a statement issued by them which they do not know to be true, as well as when they know it to be false. Hubbard v. Ware, 79 Ia. 678; 44 N. W. 915; Huntington v. Attrill, 118 N. Y. 365; 23 N. E. 544; 42 Hun. 459; 3 Thomp. Corp. Section 4244. If bank directors do not manage the affairs and business of the bank according to the charter and by-laws, and use ordinary diligence to supervise the conduct of their office, and to understand the condition of the bank, and loss ensues, they are liable for all losses their misconduct may inflict either upon stockholders or creditors. 1 Morse, Banks, Section 138. 17 Am.

& Eng. Enc. Law 109, and cases cited. They are trustees for depositors, and can be held liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is in fact insolvent. 1 Morse, Banks, Section 130a. We adopt what is so well and forcibly said in Delano v. Case, supra: 'Ordinarily, the character of the directory for integrity and business capacity increases the degree of confidence reposed in the corporation by the public. Were depositors, when intrusting to a bank their entire fortune, to be informed that the directors, upon whose honor and careful watchfulness they were relying, owed them no duty, were under no obligation to take, at least, reasonable precautions to guard their money from the itching fingers of dishonorable officials, they would certainly hesitate long before surrendering it upon such terms.' For false statements of the condition of the bank, published by authority of the directors when they knew of the falsity, or with reasonable care might have known it, the directors are personally liable. * * * Good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection of the affairs of the corporation, which is exacted of them as trustees. * * * As said above, it is not necessary that the directors should know that such reports are false; it is their duty to know that they are true. Huntington v. Attrill, supra; 3 Thomp. Corp. Section 4244; Hauser v. Tate, 85 N. C. 81, citing Bank v. Wulfekuhler, 19 Kan. 60; Bank v. St. John, 25 Ala. 566, and United Soc. v. Underwood, 9 Bush, 609."

Bartholomew v. Bentley, 15 O. 659; Am. Dec. 596-598, decided that:

"The act incorporating * * * conferred no authority upon any person to hold out false colors to deceive the public, * * * and those who combined to use it for the purpose of swindling, acted for themselves rather than as agents for the bank. They would make themselves liable, at all events, upon the general principle applicable to natural persons. * * * In Vose v. Grant, 15 Mass. 519, it is said:'* * * If any number of persons combine, with the intent to injure and defraud another, they cannot defend themselves against an action by showing that they did

the act in the character of corporators, under any charter whatever.' These are safe principles, founded in good sense, which we recognize as law." Id. 599.

"It may be that numerous suits will be prosecuted; * * * And yet the doctrine that because they have cheated thousands they are safer than they would be if only one man had suffered, does not obtain in courts of justice. * * * Again it is said the fund sought is a trust fund, and a bill in chancery is the proper remedy. There would be much propriety in the position, were it in point of fact true, that a party who has been defrauded by the act of another has no redress save out of a fund composed solely of the proceeds of the imposition. * * * But the rule that a person sustaining damage by fraudulent acts of another can only look to a particular fund of the wrong-doer for redress, never existed anywhere. * * * In this case the damages to be recovered should be commensurate with the injury done to the plaintiff, which will not in any sense depend upon the state of the assets of the bank, or its solvency. The judgment, therefore, that may be recovered will not effect trust funds, strictly so-called, but general funds, the rights, credits, and effects of the individuals instrumental in committing the fraud complained of. * * * It is not of any moment that the defendants should have made a profit by their frauds. That is an inquiry that cannot affect the plaintiff's rights. The gist of his complaint is, that they, by their acts have imposed upon him, and that he has sustained an injury by means of the imposition." Id. 598-599.

We have quoted thus fully from Bartholomew v. Bentley because it states so clearly the principles underlying an action for deceit.

In Marshall v. Farmers & Mechanics Savings Bank of Alexandria, 85 Va. 676; 17 Am. St. 84, the court (p. 90) quotes with approval from Morse on Banks and Banking, page 133, as follows:

"If bank directors do not manage the affairs and business of the bank according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both; Hodges v. N. E. Screw Co. 1 R. I. 312, 53. Am. Dec. 624. They may be held to account to an injured party in a court of chancery, or they, or any one of their number who shares in the wrong-doing may be sued at law for damages."

And holds (p. 84) that directors of a banking corporation are liable to depositors for losses resulting from their negligence and inattention, and **that want of knowledge of wrong-doing will not exonerate them because it could not exist except through negligence.**

"The publication by savings bank directors, that directors and stockholders are personally responsible for its debts, does not constitute a contract with depositors, but if intentionally false, affords the basis of an action for deceit."

Westervelt v. Demarest, 46 N. J. Law, 37; 50 Am. Rep. 400.

"It appearing, as one of the findings of fact in the case, that the plaintiff made his deposits relying upon the truth of this statement, he would be entitled to recover the loss he sustained by acting upon it, in an action for deceit." Id. p. 402.

"The directors of a bank are personally liable, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the bank solely by false representations of solvency made to the general public by the directors, **who ought to have known, and, by the use of ordinary care, such as it was their duty to have exercised, might have known,** that such representations were false, and they are so liable whether such representations were made with the intent to defraud or not."

Seale v. Baker, 70 Tex. 283; 8 Am. St. 592.

The facts in Seale v. Baker, supra, were identical with the cases at bar with the exception that the bank of which they were directors, was not a national bank.

In the opinion, Acker, J., quoting from Bartholomew v. Bentley, 15 O. 666, says:

"A valid act of incorporation, or an invalid and pretended right to exercise corporate franchises, is alike powerless to secure the guilty from the consequences of their fraudulent conduct, where it has been knowingly resorted to as the mere means of chicane and imposition, and used to facilitate the work of deception and injury. Were it otherwise, it would be a reproach to the law."

And again, 8 Am. St. 602, (quoting) says:

"There is no wrong or fraud which the directors of a joint stock company, incorporated or otherwise, can commit which cannot be redressed by appropriate and adequate remedies. * * * (p. 603). This is what is called an action of deceit, the plaintiff alleging that statements were made by the defendants which were untrue, and that he had acted on the faith of these statements so as to incur damage for which the defendants are liable."

In the closing paragraph, id. p. 604, he says:

"Forms of action do not obtain in our practice." (This is likewise true in Nebraska). "All suits are actions on the case, and we think it can make no material difference in determining the questions here involved, whether the suit is called an action for deceit, an action to recover damages for the violation of a trust, or an action to recover damages for negligence in the performance of a duty."

Special action on the case may be maintained for every fraud or deceit, which results in consequential damage to

a party, and it is no defense to such action that the fraudulent acts were done by persons acting in the capacity of corporators.

Bartholomew v. Bentley 15 O. 660.

Where by false representations fraudulently made and published by directors of a corporation, or with their sanction, the creditor is induced to loan money to the corporation, or to make a deposit, or to purchase its debentures he may undoubtedly have an action against those directors for damages where the loan or deposit is lost or the securities become worthless. Zimm v. Mendel, 9 W. Va. 580; Schley v. Dixon, 24 Ga. 273; Weir v. Barnett, L. R. 3, Exch. Div. 32.

"If the officers of a banking corporation misrepresent its condition whereby a person is led to deposit his money therein and lose it by reason of the unsafe condition of such bank, they are liable to such depositor directly to make good such loss, only upon the grounds of deceit."

Killen v. State Bank; 106 Wis. 546; 82 N. W. 536.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money and taken as collateral security therefor the stock of the bank, relying upon the statement of the directors as to its financial condition, it is no defense that the bank has been placed, by the comptroller of the currency, in the hands of a receiver, or that the receiver has settled with the directors and released them from all liability.

Barnes v. Pogue, (Supt. Ct. Cin.) 29 Weekly Law Bulletin 382; (Ohio 1893).

Cassidy v. Uhlmann, et al., 170 N. Y., 528; 63 N. E. 554, was an action against the president and two directors of a bank to recover damages for their alleged fraud and deceit in directing and permitting said bank to remain open for the transaction of business after they knew it to be hopelessly insolvent, and it was therein held that they were personally liable for damages to a depositor who, in ignorance of such insolvency, deposited money in the bank.

In the opinion, Werner, J., says: (p. 560)

"The insolvency of the bank made the directors trustees for its creditors."

In United Society of Shakers v. Underwood, 9 Bush, 609; 15 Am. Rep. 731, it was held that directors are liable for the loss of a special deposit, wrongfully converted by officers of the bank, of which conversion defendants had, or by the exercise of ordinary diligence, could have had knowledge.

Graves v. Lebanon National Bank, 10 Bush, 23; 19 Am. Rep. 50, was an action brought by a national bank against the sureties on the cashier's bond. It appeared that the sureties had been induced to sign the bond by statements of the bank's condition published by the directors in accordance with the requirements of the National Banking Act, whereby the affairs of the bank appeared prosperous and well managed, when, in fact, the bank was not in good condition, and the cashier had committed frauds and made false entries on the books to conceal them, and it was

held that the sureties were not liable because they had a right to believe that, before publishing the statement, the directors had used reasonable diligence in ascertaining the condition of the bank and being misled by the statement, the sureties were not bound.

In the opinion, id. 54, it is said:

"It may not be true that the directors of the Lebanon Bank had actual knowledge of the frauds committed by Mitchell while cashier of Burton, Mitchell & Co., nor of the false entries made by him on the books of the institution under their control in order to conceal those frauds, but it is true that either **with or without examination, they published reports of the affairs of the banking institution, and the natural, if not the necessary effect of which was to mislead the public.**"

"Depositor in bank may recover from its directors for damages resulting to him from negligence in permitting it to be held out to the public as solvent, when it was insolvent."
Delano v. Case, 121 Ill. 247; 2 Am. St. 81.

That the principles contended for have been the recognized law of the State of Nebraska, prior to the decision in these cases, will appear in the following cases: Stuart v. Bank of Staplehurst, 57 Neb. 576; Gerner v. Mosher, 58 Neb. 135; which was reaffirmed in 61 Neb. 100.

Text Books.

The writers agree with the principles laid down in the foregoing cases.

"The agents of a corporation are subject to the general rule of the common-law, that a person is liable for direct consequences of fraudulent representations whereby an-

other is misled. Thus, it has often been decided that directors are liable for fraudulent representations as to the financial condition of the company, whereby others are induced to give credit to the company, or to purchase its obligations or shares of its stock."

1 Morawetz Pri. Cor. Sec. 573.

Speaking of the liability of directors, Thompson, in his commentaries on the law of corporations, Vol. 3, Sec. 4091, says:

"1. He is, as already stated, liable to his principal for breaches of the duties he has assumed towards him, or, as the books more briefly express it, for **non-feasance.**

"2. He is also liable for trespasses, frauds, or other wrongs which he may commit against third persons while discharging the duties of his agency; or, as the books more briefly express it, for **misfeasance.** And he is none the less liable for acts of **misfeasance** from the fact that his principal may also be liable."

Id. Section 4092: "Strangers have any appropriate remedy against the directors of a corporation which one man may ordinarily have against another in the ordinary relations of civil society, not resting in contract."

Id. Section 4144. "Acts of this kind (issuing false prospectuses, making false representations, etc., whereby the public are deceived) fall within the category of acts of **malfeasance,** for which the directors participating therein are personally liable, notwithstanding the fact that the corporation may also be liable on a principle already stated. * * * They are personally liable to a stockholder for a loss of money which they induce him to loan to the corporation by false representations made fraudulently, **or in ignorance of matters which it was their official duty to know.**"

Id. Section 4145. "Thus, it has been held that bank

directors, who permit the bank to be held out as solvent, when they knew it to be insolvent, may be sued by a depositor for the damages which he has thereby sustained."

It is not necessary that the representations were made directly to the plaintiff, nor that they were concocted with the view of deceiving particular persons, but it will be sufficient if they were contained in circulars or other advertisements. Id. Vol. 2, Sec. 1472.

"Directors or officers of a corporation, who, as such commit frauds or torts upon third persons, are personally liable therefor, without reference to whether the corporation itself is liable or not.

Officers or directors of a bank or other corporation, who, by false representations or reports of its financial condition, or false prospectuses or the like, induce persons to subscribe for stock, or to deposit money with the corporation, or to enter into contracts, or otherwise to deal with it on the faith of such false representations, are liable to such persons for any loss or injury occasioned thereby. The liability in such cases is founded on the tort, and does not depend upon any privity of contract between the parties."

21 Am. & Eng. Enc. of Law, 2nd Ed. p. 880, and cases cited in notes.

"The directors are liable to depositors for gross neglect of their duties and for mismanagement, as well as for fraud and deceit, but not for errors of judgment made in good faith."

3 id. 845 note and cases cited.

"An officer of a corporation who fraudulently makes false representations for the purpose of inducing others to contract with the corporation, is personally liable in an action of deceit."

14 id. 154 and cases cited.

"A report or prospectus issued by the promoters, or by the directors or other officers of a corporation to the public generally, containing false statements as to the condition or affairs of the corporation, intended to induce persons to subscribe for, or purchase stock in the corporation, or otherwise deal with it, is to be considered as made to any person within the class contemplated who shall act thereon; and if a person does act thereon, and sues for damages, it is no defense to say that the statements were not made direct to him."

14 id. 151 and cases cited.

Directors Duty to Know.

The duties of directors was referred to in Auten v. U. S. Nat. Bk., 174 U. S. 147; 19 Sup. Ct. 637, (decided April 24, 1899).

We quote from Mr. Justice McKenna, who wrote the opinion of the court:

"This court said by Mr. Justice Harlan, in Martin v. Webb, 110 U. S. at page 15; 3 Sup. Ct. at page 433; 'directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of those officers. They have something more to do than from time to time **to elect officers of the bank and to make declaration of dividends.** That which they ought, by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.'"

In Briggs v. Spaulding, 141 U. S. 141, 11 S. C. 924, the question of the duty of directors arose between the corporation and those it had chosen as its directors, while in

Martin v. Webb, and Auten v. U. S. National Bank, the question arose between the bank and third parties and the language is:

"That they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers," etc.

It is obvious that in a transaction with third parties the directors should be held to a higher degree of accountability, because they have nothing to say as to the selection of directors, and as a rule are not in position to be able to judge their capability or integrity. Indeed it has been said in a number of well considered cases that, while the relation of directors to depositors is not technically one of trust, yet, for many purposes, it might be considered as such.

McClure v. People, 27 Colo. 371; 61 Pac. 617. In this case plaintiff in error was convicted of statutory larceny, in that, as president of a bank, he assented to the reception of deposits knowing at that time that the bank was insolvent. The statute provided in substance that if the president of any bank should receive or assent to the reception of any deposit of money in such bank or banking institution after he shall have had knowledge of the fact that such bank is insolvent, he shall be deemed guilty of larceny. The defendant "offered to show that he did not reside in the town in which the bank was doing business, gave little or no attention to it, that the actual management and control were in the hands of others, and that he did not possess any actual knowledge whatever as to its condition. * * * That he was an illiterate man, possessing no knowledge of

banking or bookkeeping, and that he was totally unable to determine from the books of the bank its condition even if he had made an examination with that purpose in view; that he was unacquainted with the people of the town of Rico and with the value of the securities held by the bank."

Campbell, C. J., who wrote the opinion of the court said: (p. 617):

"The question then is, may a banker, or an officer of a bank, exempt himself from criminal liability under the statute, by intentionally absenting himself from the bank and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that if he had given attention to its business, his lack of fitness and unfamiliarity with banking methods, would not enable him to ascertain its true condition? The mere statement of the proposition, it seems to us is its own refutation."

The syllabus of the court is as follows:

"An officer of a bank cannot relieve himself from criminal liability for receiving deposits when the bank was insolvent by intentionally absenting himself from the bank and abstaining from participating in its management and purposely neglecting to avail himself of means of information as to its financial condition, or by showing if he had given his attention to its business by reason of his lack of fitness and ignorance of banking methods, he could not have ascertained its true condition."

The opinion is well sustained by argument and supported by an able review of authorities, and seems to us a complete answer to the pretentions of Mr. Thompson.

If such be the law in criminal cases, the rule in a civil action for deceit must certainly be no more lenient.

Mr. Thompson was a director of this bank from 1884 to

1893. During all this time it was his duty to aid in the active management and control of the bank, yet, during all that time he admits he made not the slightest effort to acquaint himself with its condition, or to assist in its management.

The Superintendent of a railroad; owner of nine hotels; in charge of the Lincoln Gas Co., the Lincoln Electric Co., President of the Farmers & Merchants Ins. Co., President of the Aurora State Bank, Vice-president of the American Exchange Bank of Lincoln, (p. 224), negotiator for the purchase of the Terra Haute, Ind., gas plant, and lastly, we are told, an Ambassador, permitting his name to be used to induce business for the bank, yet so grossly and criminally negligent as to never even make an effort to acquaint himself in the slightest with the affairs of the bank, and withall claiming to be so ignorant that even by the examining of the books or assets of the bank, he could not tell if it was insolvent! If he were so densly ignorant, he certainly deceived the patrons of the bank by pretending to have abilities which he had not.

In Hall v. Henderson, 126 Ala. 495; 28 So. 544, decided in 1900, Tyson, who wrote the unanimous opinion of the court, says, id. 543:

"The doctrine is stated by Thompson on Corporations (section 5308) to be: 'It is a sound view, at least in so far as the question respects the rights of third parties, that the directors of a corporation are in law **conclusively presumed** to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason of this is that it is their duty to know these things in the exercise of their official func-

tions. This doctrine is said to be one founded in public policy, essential to the safety of third parties in their dealings with corporations, and to the protection of the stockholders interested in the welfare and safe management of corporations.' Justice Brewer, now of the Supreme Court of the United States, while a member of the Supreme Court of Kansas, in the case of Bank v. Drake, 29 Kans. 326, said: **'The directory, as has been said, is the visible representative of the bank. Persons dealing with it meet only this visible representative and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its condition and business.** On the other hand, the stockholders and depositors—the persons who are pecuniarily interested in the safe management and prosperity of the bank—look to the **directors as the chosen guardians of their interests, and have a right to demand of them that they watch over all those interests in their minute details. So that all of these parties have a right to assume that the directors know all the transactions, business, and condition of the bank, because they ought to know them, and because otherwise they do not discharge their full duties to these various parties.'"**

He also quotes with approval from Society v. Underwood, 9 Bush 609, wherein that court said: (id. 544 and 545)

"Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and as to their dealings with the bank they not only act for it, and in its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and, if they fail in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation. Hodges v. Screw

Co., 1 R. I. 312. * * * It is further objected that the allegation of notice is so far qualified as to render insufficient the averment of its existence. It is stated that appellees 'and each of them, had, or could have had by the use of the most ordinary diligence and investigation, ample notice.' It is also alleged by Davenport that they each 'had notice, as well from the ledgers, books, and accounts of said bank as from its correspondence, reconcilements, and statements.' It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention. It is not necessary, in many cases, to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or wilfully careless in the discharge of their duties," and cites authorities in support thereof.

See also note to Henry v. Dennis (Me.) 85 Am. St. Rep. 388, 399, where it is said:

"Before making representations as to the condition of the corporation as inducements to take stock therein, or extend credit thereto, it is the duty of the officers to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring them. * * * If false and fraudulent statements are put forth under the authority of the directors, **it is not necessary that they should know them to be such; it is their duty to know them to be true and they are liable for damages sustained by anyone dealing with the corporation, relying on the truth of such reports.** Solomn v. Bates, 118

N. C. 311; 54 Am. St. Rep. 725; Hustin v. Thornton, 122 N. C. 365; 65 Am. St. Rep. 699."

Scienter.

"Where directors of a national bank by their gross negligence permit fraudulent statements of the condition of the bank to be published, they are liable to a person misled and injured thereby, although they did not participate in the fraud."

Houston v. Thornton (N. C. 1898); 29 S. E. 827.

"A person falsely assuming a knowledge of certain facts and making representations thereto without knowing either the truthfulness or falsity thereof, is subject to the same liability for injuries resulting therefrom as if they were made with full knowledge of the facts."

Taylor v. Commercial Bank, 73 N. Y. S. 924; 68 App. Div. 458.

"An untrue representation of a material fact as ones knowledge, or recklessly made, not knowing whether it is true or not, is a fraud."

Snidley v. Maixsell, 97 Ill. App. 365.

"A representation may be actionable though the person making it did not know it was false."

Beatty v. Bulger, (Tex. Cir. App. 1902) 66 S. W. 893.

In Cooper v. Schlesinger, 111 U. S. 148; 4 Sup. Ct. 360, this court, held that "A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule."

Again in Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665; 14 Sup. Ct. 219, Mr. Justice Harlan, delivering the opinion of the court observed:

"The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representation, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon, by the purchaser or lessee, the truth of which representations the vendor or lessor is bound, and must be presumed, to know. * * * Where the representations are material, and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of their being untrue is not essetnial. We perceive no objections to these instructions."

Hindman v. First National Bank, 112 Fed. Rep. 931 (in which a writ of error was denied by this court April 28, 1902, 186 U. S. 483) was a common-law action of deceit against the bank for a false representation as to the condition of the Columbia Fire Ins. Co. made by the cashier of the bank (who was also an officer of the Insurance Company) by reason of which complainant was led to buy shares of the Insurance Company's stock. The circuit court of appeals sustained the right to the action and held that: "to sustain an action for fraud and deceit based on false representations by defendant by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false, and (2) that the person making it knew it to be false; **but if the fact was one within his means of knowledge, and he had no knowledge of it, the jury is authorized to find that the statement was knowingly made."**

In the opinion, Lurton, J., (p. 944) says:

"If the fact be one within his means of knowledge and he have no knowledge of the fact, the jury would be authorized to believe that the statement was knowingly false."

In Martin v. Webb, 110 U. S. 7; 3 Sup. Ct. 428; it was said:

"That which directors ought, by proper diligence, to have known as to the general course of the bank's business, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business."

"Directors are liable for injuries to a person who relies upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false."

Morse on Banks and Banking, Sec. 132.

"What the directors ought to have known by a proper diligence as to the general course of the bank's business, they are presumed to have known in any contest between the bank and third parties dealing with it in good faith."

Id. Sec. 133.

"Where the cashier of a bank, acting within the scope of his authority, and for the purpose of enabling the bank to collect or secure a debt owing to it, makes false representations concerning the financial responsibility of a debtor to a person from whom such debtor is endeavoring to purchase goods upon credit, with knowledge that such representations are false, **or assuming to have positive knowledge of the facts, when as a matter of fact he has not such knowledge,** and thereby induces the party to whom the representations were made to sell the goods to the debtor upon credit, the bank is liable for the wrongful act of such cashier, although it was done without its authority or knowledge and resulted in no profit to it."

In Taylor v. Commercial Bank, 68 App. Div. (N. Y.) 460. On page 462, McLennen, J., who delivered the opinion of the court, said :

"At all events, according to plaintiff's testimony, he made a material representation assuming to have knowledge of the facts, and therefore the liability is precisely the same as if made with knowledge of its falsity.

"An action to recover damages for deceit cannot be maintained without proof of fraud, as well as injury, but the fraud may consist in the affirmation of positive knowledge of that which one does not positively know; and where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true."

Hadcock v. Osmer, 153 N. Y. 604; 47 N. E. 923.

In Haddock v. Osmer, supra, Vann, J., quotes with approval from the opinion of Judge Peckham in Rothschild v. Mack, 115 N. Y. 7; 21 N. E. 726, as follows:

"He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and endorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representation he made as to the value of the note, and he either knew such representations were false, or else he was conscious that he had no actual knowledge while assuming to have it, and intending to convey such impression. If damage ensue, this makes an actionable fraudulent representation."

He also quotes from the opinion of Chief Justice An-

drews, in Kountze v. Kennedy, 147 N. Y. 124, and Furnace v. Moffitt, 147 Mass. 403; 18 N. E. 168, where the same principle is sustained.

We have referred especially to the New York cases because of the statement contained in brief on behalf of Mr. Thompson that they held otherwise.

It would extend this brief to an unreasonable length to review all the authorities sustaining this principle.

The rule is well stated, and decisions in support thereof from nearly every State cited in a very able article in 20 Cyc. p. 27, wherein it is said:

"It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge, and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent. The rule just stated applies, although the speaker honestly believes that the fact which he represents as existing actually does exist.

In such case it is apparent that he cannot believe in the truth of the statement he makes—that he knows the fact to exist—and the fraud consists in passing off his opinion or belief in the guise of positive knowledge. Consequently the speaker is not relieved from liability, although in making the assertion he relies upon trustworthy information." id. p. 29 note. "This rule is not an exception to, but an application of, the principle that actual fraud must be shown to sustain an action of deceit; and it is not in conflict with the rule requiring a scienter." See cases cited.

A wide distinction exists between representations, which in their nature can be nothing more than mere expressions of opinion, and those made as representations of facts

within the knowledge of him who makes them. The former is illustrated by statements made concerning the solvency of third parties; the latter by statements made by one concerning his own financial condition or that of a corporation of which he is a director.

The authorities cited on behalf of plaintiffs in error, involved cases belonging to the former class.

Thus, Lord v. Goddard, 13 How. 109, was an action against Lord for damages sustained by the plaintiffs by reason of having extended credit to West & Daby upon the recommendation of Lord that they were well worthy of credit. It was a matter upon which Lord could have had no actual knowledge, but was apparently giving merely his opinion.

In the syllabus this court held:

"The gist of an action for false representation concerning the credit of another, is the fraud of the defendant and damage thereby done to the plaintiff."

Referring to this decision (Lord v. Goddard, supra) in Lord v. Colley, 6 N. H. 99; 25 Am. Dec. 445, at note on page 499, it is said:

"But more recent considerations of this question have led the courts to adopt a more comprehensive construction of 'fraudulent' as used in the rule."

The case of Daly v. Wise, 132 N. Y. 306; 30 N. E. 837, cited by plaintiffs in error does not sustain the principle contended for.

In the opinion (30 N. E. 839) Follett, C. J., who delivered the opinion says:

"In case a party, for the purpose of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied upon, and is subsequently found to be false, **although he had no actual knowledge of the untruth of the statement.**" Citing authorities from which it appears that actual knowledge is not essential. The case went off on a question of fact as appears in the closing paragraph of the opinion:

"It does not appear that the plumbing had not been fixed as stated, nor that the statement that 'it was all in good condition' was made without actual or supposed knowledge of its condition, nor that it was made in bad faih; and we think the case does not fall within the principle of the authorities last cited."

The case of Ming v. Woolfolk, 116 U. S. 599, 602; 6 Sup. Ct. 489; does not sustain the contention of plaintiffs in error.

All this case decided was—"A party cannot recover damages for deceit practiced upon him unless he can prove that he has suffered by the deceit."

The portion of the opinion quoted in Mr. Rose's brief was merely the statement of general principles of law cited by Mr. Justice Wood, who delivered the opinion, as authoity for the doctrine that in order to sustain an action for deceit it is necessary that the complaining party altered his condition in consequence of such representations **whereby he sustained damages.**

The question of knowledge or scienter is not discussed, nor does the learned Justice refer to what would or would not constitute knowledge. A casual examination of this opinion will show that it is not authority on the point for which it is cited.

The same is true in Gordon v. Butler, 105 U. S. 553, 556. In this case the defendants had given their opinion as to the value of lands supposed to contain sandstone quarries, which had not been developed, as the plaintiff was aware, and whose value he knew to be conjectural.

It was held that the action would not lie, "the defendants not being liable for an expression of opinion, however fallacious, in regard to property, the value of which depends upon contingencies that may never occur, or developments that may never be made."

In the opinion Mr. Justice Field, p. 557, says:

"How could an overestimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. * * * (558). For opinions upon matter capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie."

Kountze v. Kennedy, 147 N. Y. 124; 41 N. E. 414, recognizes the principles we contend for. This decision was by a divided court, Bartlett, J., dissenting, and Peckham, J., not voting. Andrews, C. J., who wrote the majority opinion of the court, says:

"We have referred to a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, as sufficient to sustain the action if the representation was in fact untrue. The making of a representation to influence the conduct of the person to whom it is made, carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation. As was said by a Maull, J., in Evans v. Edmonds, 13 C. B. 777, 'He takes upon himself to warrant his own belief of the truth of that he asserts, and a man who makes a representation which he neither knows nor cares whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception.' So, also, it has been held that one who falsely asserts a material fact, succeptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he had no knowledge, and that fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results."

In this case the referee found as a question of fact that the representation was made in the belief that it was true, and that the principal matter which had been misstated consisted of a claim of doubtful validity concerning which the defendant had been advised by counsel that it was not a valid claim. The referee also found that the statement of assets and liabilities declared upon was not made by the defendant as being within his personal knowledge. To quote:

"Certainly the mere presentation of such a statement, without more, would not amount to an affirmation that the statement was true to his knowledge."

Bartlett, J., dissented, "on the ground that it is not proper for an officer of a corporation making a written statement of its indebtedness to a proposed purchaser of its stock to omit therefrom the amount involved in a pending action against the company for the reason that he is of the opinion that the company will not be held in final judgment; that it is the manifest duty of such officer to inform the proposed purchaser of stock of the existence of this contingent liability, and the failure to do so is a fraud."

Nature of Representation.

The representations upon which these deposits were made recite that they are **reports of the condition of the bank at the close of business on a certain day.** They are signed by the directors, with the words "CORRECT. ATTEST:" The report itself purports to be a statement of a matter which the makers know to be true, and it is strengthened by the significant words "Correct. Attest." The word "correct" as defined in Webster means "conformable to proof, rectitude, not faulty or imperfect, free from error" and is said to be synonymous with "accurate, right, exact, precise, faultless." The word "attest" is defined by the same authority to mean "to certify; to affirm to be true or genuine; as to attest the truth of a writing."

When a director signs this statement he says in substance:

I am a director of this bank. As such it is my duty to actually and actively manage the affairs of the bank and know its true condition. I have performed that duty and the foregoing statement of the bank's condition is true, exact, precise, faultless, and free from error.

That is what it means to those to whom it is directed,

whether to the public or to the comptroller. It is not the expression of an opinion or a belief, but the statement of a positive fact.

If the contention of the directors be accepted as the true measure of their liability, their statements and representations would mean merely this:

I am one of the directors of the bank. I am a man of influence in the community. My name in the list of directors will bring business to the bank and thus increase the value of my stock. I am too busy to pay any attention to the conduct of the affairs of the bank, and too ignorant to know anything about it if I tried, and have therefore abdicated that function to the cashier who says he is honest. The foregoing statement was prepared by a clerk who is employed by this cashier in whom I have confidence. I have never examined a book nor an asset of the bank; nor have I given its affairs a moment's time or attention except to aid in electing myself director from year to year and declaring dividends (out of depositors' money) which acts I have done with untireing fidelity. I really have not the slightest knowledge as to the correctness of this statement, but I believe it to be true and would be pleased to have everybody accept it as correct and accordingly deposit your money in the bank.

If such is a true purport of the statement, it ought to be expressed more clearly.

What would the comptroller say if he received a report with such a statement of the director?

It is folly to say that the report means anything less than the words "correct, attest" indicate, and it would be

ridiculous to say the statements were mere expressions of opinions made in good faith.

The statement is as much a representation that he knows the condition, as it is as to any other statement therein contained. When, therefore, he signs a statement which is not correct, he has knowingly made a misrepresentation because he has said he knew, when in truth he knew he did not know. In other words, he makes a statement claiming to know it to be true, but in fact, he knows he has no knowledge whatever concerning it.

Viewed as a common-law action of deceit the decision of the Supreme Court of Nebraska is not erroneous.

True, it is held in the syllabus, that "it is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity" (Jones Rec. p. 87). And the only other reference to that subject is contained on page 94 id. where Albert, commissioner, says:

"We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case. But, as was said in Gerner v. Mosher, 58 Neb. 135, **it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense.**"

We submit this statement of the law is sustained both upon principle and authority, and would not merit a reversal even though it involved a federal question.

The use of the word "scienter" in the opinion in Gerner v. Mosher, 58 Neb. 135, was a mere obiter, and yet it does not contravene the true principle at the bottom of the liability in such cases.

To say on one hand there need be no actual knowledge, and on the other that there must be knowledge, but that this knowledge will be conclusively presumed to exist, when in fact it is conceded not to exist, involves a distinction too subtle for practical application.

Referring to the Nebraska cases, in 20 Cyc. 29, it was said:

"The decisions themselves are not inconsistent with the theory that the courts, when asserting that knowledge of the falsity is not essential, merely meant that where a person makes a positive assertion as of his own knowledge when in fact he is conscious that he has no knowledge on the subject, his liability is the same as though he knows his statement to be false."

On page 4 of Mr. Rose's brief, he says:

"Thus, the state court, while exercising authority upon the **assumption that the National Banking Act, by its own terms** (Sec. 5239 Rev. Stat. U. S.) **subjects bank directors to common-law liability for deceit,** declines to be bound by the limitations of the act which, **it is claimed,** adopts the common-law action, but in terms makes scienter an indispensable element."

An examination of the opinion of the state court will reveal that counsel misapprehends the principles upon which it is based. It does not assume that the federal statute either created or modified the action of deceit, but on the contrary, that it left it as it was at the common-law.

Perhaps mention should be made of Derry v. Peek, 14 App. Cas. 337, relied upon by plaintiffs in error as an authority in support of their contention.

The force of its authority, if it ever had any, is no longer recognized either in England or the United States.

The following quotation from 10 Cyc. 844 note, we think effectively disposes of that case:

"The decision of the house of lords in the celebrated case of Derry v. Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33, which allowed directors to substitute their own belief in the place of their knowledge in putting forth prospectuses concerning their company, and escape liability to their dupes, although their belief was ill-founded, provided it was bona fide, tended to let down the commercial morality of England to a deplorable extent, and was met with a storm of dissent on the part of the profession and the public. It was severely criticised by Sir Frederick Pollock, in the Law Quarterly Review of October, 1889; and unfavorable comments upon it will be found in 5 Law Quart. Rev. 410; 6 Law Quart. Rev. 72; 6 Law Quart. Rev. 112; 7 Law Quart. Rev. 106. But the rule which it established was subsequently abrogated by act of parliament. Directors' Liability Act 1890; L. J. Stat. 403, L. R. Stat. 516, set out in full in 2 Thompson Corp. Section 1466."

II. SECTION 5239 REVISED STATUTES U. S. NEITHER ABROGATES NOR MODIFIES THE COMMON-LAW ACTION OF DECEIT.

Section 5239, supra, is as follows:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in case of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other

person, shall have sustained in consequence of such violation."

This is the section upon which plaintiffs in error rely as having cut down the common-law action of deceit.

We submit, however, that it will not admit of such a construction.

"When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act. This rule does not conflict with the general rule that the jurisdiction of a court is not impaired by statutes conferring upon other tribunals, jurisdiction of the same kind and to reach the same redress, unless the statute expressly take away the former jurisdiction; nor with the other well-settled rule, that if a statute gives a remedy in the affirmative without a negative, express or implied, for a matter which was actionable at common-law, the party may sue at the common-law as well as upon the statute; for this does not take away the common-law remedy. * * * Statutes affirmative of the right, and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it upon other tribunals, not negativing the pre-existing remedies or jurisdiction, in their very nature are merely cumulative, and not exclusive. * * * Where a statute gives a new remedy for a right existing and enforcible either at common-law or in equity, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two."

Sutherland on Statutory Construction, Section 399, 1st. Ed., or Section 572, 2nd Ed. See also Sedgwick on Construction of Stat. and Constitutional Law, 323.

Where the statute creates the right and the remedy, the statutory remedy must be followed, but, where the right existed at common-law and an additionaly statutory remedy is given, the latter is regarded as cumulative

People v. Craycroft, 2 Cal. 243; 56 Am. Dec. 331.

"Remedies are cumulative where the statute gives a remedy with a penalty, a previous common-law remedy existing."

Dygert v. Schenck, 23 Wend. 445; 35 Am. Dec. 575.

The Act of Congress requiring inspection of steam boats and a certificate does not impair the common-law right of action by persons injured.

Swarthout v. N. J. Steamboat Co., 48 N. Y. 209; 8 Am. Rep. 541.

Where the legislature fails to provide a remedy for an injury occasioned by public use, the injured party will be remitted to his common-law remedy.

Hooker v. New Haven & New Hampton Co., 14 Conn. 146; 36 Am. Dec. 477.

Where a statute gives a right and provides no remedy, the party may pursue any remedy of the common-law adapted to the nature of the wrong or injury.

Maple v. John, 42 W. Va. 30; 57 Am. St. 839.

"If a statute gives a remedy in the affirmative without containing any express or implied negative for a matter which was actionable at the common-law, this does not take away the common-law remedy. The statutory remedy will be regarded as concurrent. * * * A statutory remedy cannot be made exclusive by the legislature as against a party who has a right to redress under the constitution of the state, unless such statutory remedy is commensurate with the constitutional right and the remedies to which by force of the constitution, he was entitled for his protection."

Hickman v. City of Kansas, 120 Mo. 110; 41 Am. St. 684.

Statutory remedy to compel a bidder to take property is cumulative, and does not take away the common-law action to compel specific performance.

Dawson v. Miller, Admr. 20 Tex. 171; 70 Am. Dec. 380.

If a duty is imposed by statute and no remedy is given for its breach, the remedy is by the common-law procedure.

Birmingham M. R. Co. v. Parsons, 100 Ala. 662; 46 Am. St. 92.

A statutory liability without providing procedure for its enforcement can be enforced by any court having jurisdiction of the parties and the subject matter, even in another state, and it makes no difference whether the action is ex contractu or ex delicto. Northern Pacific Lumber Co. v. Lang, 28 Oreg., 246; 52 Am. St. 780.

"Where a new right is introduced by statute, the statutory remedy is the one to be pursued, but where there is a pre-existing right at common-law and an affirmative statute inflicts a new penalty, the law is otherwise."

Lang v. Scott, 1 Blackford, 405; 12 Am. Dec. 257.

"If a statute provide a remedy for a matter before actionable at common-law, the common-law remedy is not thereby divested."

Crittenden v. Wilson, 5 Cowen 165; 15 Am. Dec. 462 and note.

"Affirmative statute does not take away rights derived from the common-law."

Methodist Church v. Remington, 1 Watts, 218; 26 Am. Dec. 61.

"New remedy being given by statute does not take away the common-law remedy already existing."

Donnell v. Jones, et al, 13 Ala. 490; 48 Am. Dec. 59.

Solomon v. Bates, 118 N. C. 312; 24 N. E. 478, was an action identical with the one at bar, and it was therein held that Section 5239 creates neither an action for deceit, nor one for negligence or misfeasance in behalf of creditors.

In Barnes v. Swift, 3 Ohio N. P. 291 (1894) Judge Hunt in overruling the demurer to a petition in an action for deceit (almost identical with the petitions in these cases) alleged to have been practiced by the officials of a national bank, said:

"The remedy provided in Section 5239 of the Rev. St. of the United States cannot well be regarded as limiting the right of recovery at common law for fraudulent representations resulting in injury."

In King v. Pomeroy, 121 Fed. Rep. 287, it was held that while a remedy given by the act creating the right is ordinarily exclusive, a new remedy provided in a case in which the right and an appropriate remedy already existed is merely cumulative, and the injured party is at liberty to pursue either.

Flynn v. Third National Bank et al, 122 Mich. 642; 81 N. W. 572, was an action by a creditor of a **national bank** against its directors for injury done and loss sustained by the bank by the negligence and mismanagement of the bank and it was held that an **action might be sustained against the directors of a national bank for negligence and mismanagement** of its affairs, resulting in loss.

3 Thomp. Corp. Section 4113. "The liability of directors of national banks is unquestionably the same in substance under the provisions of the national banking act, as under the principles of the common law and of equity. * * * It has been held in one of the federal circuits, (Welles v. Graves, 41 Fed. Rep. 459) that if the right to forfeit the charter of a national bank for violations of law under the National Banking Act, is lost by lapse of time, the directors cannot be proceeded against individually for such violation; * * * but the decision seems to be a strange aberration for there does not appear to be any connection between the two things except that they are spoken of in the same sections of a statute."

That the remedies afforded by the National Banking Act are not exclusive, but that the common-law remedies exist and may be enforced in the state courts was expressly recognized in the recent case of **Guthrie v. Harkness, 199 U. S. 148**, decided Oct. 30, 1905. This was an application for a writ of mandamus to compel the directors of a national bank to permit the stockholder to examine the bank's books. It was insisted that this right was cut off by Section 5211 requiring reports to be made to the Comptroller, and Section 5240 providing for the examination of banks, and Section 5241 providing that such associations shall be subject to no visitorial powers other than those authorized by the National Banking Act or vested in courts of justice. But it was held by an unanimous court that "the common-law right of a stockholder, for proper purposes, and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks" by any of the provisions of the National Banking Act.

Mr. Justice Day, delivering the opinion of the court, says:

"While the state has no power to enact legislation con-

travening the federal laws for the control of national banks, Congress has provided that, for actions against them at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the circuit and district courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state. * * * If the stockholders had the legal right to enforce inspection, there is no room to question the authority of the state courts to enforce the right by granting the proper relief in a judicial proceeding."

In closing, he says:

Finding nothing in the Act of Congress limiting the common-law right of the shareholder, we think that, under the circumstances of this case, he was wrongfully denied an inspection of the books and accounts of the bank by its officers, and the judgment of the Supreme Court of Utah is affirmed."

Whittmore v. Bank, 134 U. S. 527; 10 Sup. Ct. 592, was an action commenced in the United States Circuit Court for the district of New Hampshire by a stockholder for himself and such others as might join, against the directors, cashier, and ex-director of a **national bank** at Manchester, N H., to compel them to pay money lost to the bank by reason of their illegal conduct, charging them with doing acts **"in doing which the directors** and officers **violated their duties and obligations to the bank's stockholders, and their acts were in violation of the charter of the bank and the laws of the United States."**

This court dismissed the bill for want of jurisdiction in the circuit court.

The syllabus is as follows:

"Under Act of Congress July 12, 1882, providing that the jurisdiction for suits by or against any association established

under any law providing for national banking associations, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against banks not organized under any law of the United States, the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by reason of their illegal conduct.

Nor is such jurisdiction conferred by Rev. St. of United States Section 5209 prescribing punishment for embezzlement or wilful misapplication of the funds or credits of a national banking association by its officers or directors; nor by Section 5239, providing for a suit by the comptroller of the currency to forfeit the franchises of national banks for the intentional violation by their directors of the law relating to national banks."

This clearly recognizes the existence of common-law rights and remedies as against the officers of a national bank which may be enforced in a state court. Had the cause of action been one created by the National Banking Act, the United States circuit court would have had jurisdiction.

It will be observed that in this case it was alleged that the acts were in violation of the laws of the United States, the language which it was held in Bailey v. Mosher, 63 Fed. Rep. 488, brought that action under the National Banking Act.

In ex parte Chetwood, 165 U. S. 443; 17 Sup. Ct. 385, it was held that:

"A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and

the comptroller of the currency have all refused to bring such a suit."

In Boyd v. Schneider, 131 Fed. Rep. 223, it was held that:

"The National Banking Act providing for the administration of the affairs of an insolvent national bank by a receiver appointed by the comptroller of the currency, does not prevent depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit that the bank would use such deposits and its other assets in conformity with the safeguards provided by law."

In the opinion, Grosscup, J., says (p. 226 and 227):

"The bill shows also, that the directors had knowledge of some of those violations of law such as the payment of dividends out of the capital stock, and the increase of loans in large amounts to the Calumet Co., after notice from the Comptroller; that such loans were contrary to law; and also that of all other violations of law they would have been advised had reasonable diligence on their part been exercised.

It seems clear to us, that on such a state of facts the directors are answerable in some kind of action directly to the persons to whom their duty ran; and that, to the extent that the depositors suffered loss therefor the right of action, whatever it may be, runs directly to the depositors as a class.

The question is not determined by whether the amount thus recovered might not become an asset of the bank; but whether aside from that, the depositors may enforce the liability as a right special to them—a right growing out of the contract of deposit, and not common therefore to stockholders and other creditors, not depositors.

Unless the National Banking Act cuts deep enough to cut out these individual rights of action, the depositors have, in some form, a right to bring action on the claim set forth."

The argument on behalf of plaintiffs in error is based upon the assumption that Section 5239 Rev. St. U. S. creates the common-law action for deceit, or a liability analogous thereto.

Thus on Page 2 of Mr. Rose's brief, we find this statement:

"If the court should be of opinion that the (federal) statute subjects directors to comon-law liabilities, and to common-law remedies for their enforcement, it is still obvious that Section 5239 Rev. St. U. S. **creating such liabilities,** in terms narrows and restricts their application to the wrongful acts of the directors done knowingly and wilfully.

This point, **if meritorious,** will, in the case of Mr. Thompson be fatal to the judgment of the state court, even if the general doctrine at its foundation—**that the case presents simply the common-law cause of deceit**—is approved."

The argument is specious because it assumes that Section 5239, supra, creates or modifies the common-law action of deceit, when in fact it neither creates nor modifies it. Assuming it did create a liability analogous to the common-law action of deceit, that would not destroy the common-law action. It would be simply creating a new liability, which, being cumulative, would leave the common-law remedy unmodified.

The words "knowing" and "wilful" ("wilful" does not appear in Section 5239) cannot be read into the common-law action of deceit. By their plain import, they apply only to the acts condemned by the National Banking Act.

But we insist it creates no such liability. The language of the section is that "in cases of **such violation,** every director who participated in, or assented to the same, shall be liable in his personal and individual capacity for all damages which the association, its shareholders, or any other persons, shall

have sustained in consequence of such violation,' and it is argued that the words "such violation" refer to the first paragraph of said section which provides that he "shall knowingly violate," etc. Assuming this to be the correct construction, the statute affords no relief for the injury these depositors have sustained.

Section 5239, supra, creates a cause of action, only in case the directors "knowingly * * * violate any of the provisions of this Title" (Title LXII—National Banks) and you will search in vain for any provision making it an offense for, or prohibiting a director from making a false report of the bank's condition to a depositor—(or in fact anyone).

Section 5209 Rev. St. U. S. is the only one containing a suggestion in that direction, and it does not make it unlawful for a director to make or publish false reports of the bank's financial condition.

This was expressly decided in Cochran v. United States, 157 U. S. 286; 15 Sup. Ct. 629, wherein Mr. Justice Brown, construing Section 5209, supra, says:

"But, under Section 5209, there is no penalty fixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by Section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association."

It follows, that if we are to rely upon Section 5239, supra, for our cause of action, we have none.

Let us assume a national bank becomes insolvent without fault on the part of the officers or directors; that the officers and directors, knowing of such insolvency, make a false statement of the bank's condition in a private communica-

tion to a prospective depositor, to induce him to deposit money in the bank. (We assume the case of a private communication so as to eliminate all reference to the National Banking Act.) **Can it be said the depositor has no redress?** Yet, plainly, the National Banking Act affords him no remedy.

We doubt if Congress has power to thus license national bank directors to deceive and defraud the public with impunity, although it should attempt by express enactment so to do.

Assuming again, that the federal statute creates a liability running direct to the depositors, for the deceit and fraud practiced upon them, how could the receiver maintain such an action?

Neither the bank, the shareholders, nor the creditors in general have suffered damages. How would such an asset be "ratably distributed" among all the creditors.

Suppose but one depositor out of a total of 1,000 has been thus deceived, must he pro-rate his recovery with the 999 who have not been deceived—hence suffered no damages?

That the National Banking Act is a "complete system" proves nothing, if admitted. The expression is used with reference to the bank, as an entity and its affairs. Used in any other sense the expression is incorrect, for it does not provide relief in many cases, but remits those affected to their common-law remedies.

We do not question the power of Congress to regulate national banks nor in so doing, to preclude state regulations or interferences, but we do contend that the regulations which Congress has imposed are not exclusive of the common-law.

That it was the intention of Congress that national banks

should be deemed the same as private citizens (except in a few specified cases) and should therefore be ame able to the common-law as well as the statutes of the various states when not in conflict with a federal law, is quite evident, for, by the Act of July 12, 1882, Chap. 290, Sec. 4, it provided that jurisdiction of national banks shall be the same as, and not other than, a state corporation (except in suits between the bank and the United States, its agents, etc.)

And again in the Act of August 12, 1888, Chap. 866, Sec. 4, wherein it provided that national banks for the purpose of all actions by or against them shall be deemed citizens of the state in which located.

Congress had no grave fears of state interference, but saw the justice of permitting ordinary actions to be tried where the parties to the suit reside.

The action of deceit is not an attempt by the state to regulate or interfere with the affairs of a national bank. It in no way interferes with the performance of its functions as contemplated by Congress.

The action is not against the bank at all, but **against the directors as individuals.** In fact, they may long since have ceased to be directors, when the suit was commenced.

Or, like these cases, the bank may have become insolvent, its charter revoked, its affairs wound up and the receiver discharged.

Or, they may never have been directors at all (de jure) but mere imposters. How can the action be said to interfere with the regulation of the bank, or the performance of its destined functions?

This action does not come within the principles announced in Easton v. Iowa, 188 U. S. 220-239, because in that case

the legislature of Iowa assumed directly to interfere with the operation of the bank while it was a going concern; nor with the principle announced in Davis v. Elmyra Savings Bank, 161 U. S. 275-290, because in that case the legislature sought to interfere with the operation of a bank and by attempting to give preference to safety bank depositors, came into direct conflict with the provisions of the National Banking Act requiring ratable distribution of the assets among creditors. These actions have nothing to do with the assets the bank. The receiver could not maintain it because the wrong complained of is one that did not injure the bank. If anything, it aided the bank, because, by means of false representations, the bank obtained large deposits of money.

The injury was not suffered in common with other depositors because perchance but one out of an entire thousand depositors may have suffered the injury of which we complain.

The fact is that only four out of the entire list of creditors of the Capital National Bank have ever obtained judgment against the directors of this bank in their individual capacities. The recovery could in no event ever become an asset, and was not within the purview of the National Banking Act providing for a ratable distribution of its assets among creditors. The act does not assume to legislate on this question, but leaves the depositors to their remedy at the common-law.

It could not have been the intent of Congress to grant an immunity to directors for any fraud they might commit against creditors of the bank. Yet, to concede the contention of plaintiffs in error, would result in the conclusion that the directors can in no event become liable to a depositor for fraud and deceit. This is apparent, **first,** because Section 5239 gives rise to no such liability, and **second,** if it be true

as contended that the cause of action is an asset of the bank and can only be recovered at the suit of the receiver, and then only for ratable distribution among all creditors, then this action would not lie, because the bank for whom the receiver sues, has suffered no injury, and, if there could be such a recovery, it would be giving practically all of the recovery to creditors who had no cause of action and were not entitled to any portion of the recovery because they had not been deceived.

We are cited to Briggs v. Spaulding, 141 U. S .132-173; 11 Sup. Ct. 924, in support of the proposition that the personal liability of directors is derived from the Act of Congress and that if the common-law remedies are available against directors in favor of "any other person" it is because of their adoption by Congress in Sec. 5239"; and, having been so adopted, these remedies are subject to the express limitations and restrictions placed upon them by the literal and precise terms of the act of adoption defining the precedent conditions of their availability," by which, of course, is meant that the act must be knowing and willful. If we correctly apprehend the purport of that decision, it holds quite the contrary. In the syllabus it is said:

"Since the National Banking Act is silent as to the time when, and method by which a director may resign, the common-law governs."

Thus recognizing the existence of the common-law remedies in the absence of any express provisions in the National Banking Act.

That action was a suit by the receiver of the First National Bank of Buffalo against the directors of the bank

in which it was sought to charge the directors for negligence and gross inattention in the affairs of the bank by reason of which it sustained damages. It will be observed the action was by the corporation against its own agents. **It was not charged that they knowingly violated any law, or were guilty of dishonesty, but that they did not diligently perform duties devolved upon them.**. Mr. Chief Justice Fuller, who delivered the majority opinion of the court, said (p. 146):

"Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although, if any director participated in, or assented to any violation of the law by the board, he would be individually liable. * * * It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. * * * Indeed, it is frankly stated by counsel that 'although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong doing'; and Section 556 Mor. Priv. Corp., is cited, which is to the effect that 'the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation **is not created by force of the statutory prohibition.** The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority to the damage of his principal.' * * *

The theory of this bill is that the defendants are liable, **not to stockholders nor to creditors, as such, but to the**

bank, for losses alleged to have occurred, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the question arising thereon would depend upon different considerations." (bottom p. 149)

It appears that in this case the bank had been for 14 years run solely by its executive officers.

The Chief Justice places great stress upon the fact that in the case of one director he had leave of absence on account of ill health for one year. That in the case of another, when he accepted the position, it was understood he was not to take any active interest in the management of the bank but was merely to act in a sort of an advisory capacity "and that he accepted the position upon the understanding that he should occupy this relation." That as to another, he sold his stock and resigned as a director before the injury complained of was sustained. That as to another he accepted the position upon the assurance that it would not require much of his time, and that shortly after he became a director his wife became periously ill, and "through the extra strain put upon him, fell himself into such a physical and mental position as incapacitated him for properly attending to business."

After reviewing the circumstances and conditions under which these parties became directors, the learned Justice says:

'Would it not have been the exercise of an extraordinary degree of care if these defendants had insisted within the first 90 days, upon making such an examination?* * * The turning point, so far as Spaulding and Johnson are concerned (and we include with them Francis E. Coit) is

whether, under all the circumstances, they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them. * * * Without reviewing the various decisions on this subject, we hold that the directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as mere figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong doing, if that ignorance was the **result of gross inattention**; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, and it is really to that the case becomes reduced at last." (p. 162 and p. 165)

It will thus be seen that the liability was predicated solely on the common-law and that the provisions of Sec. 5239 were evidently not considered material for no reference is made as to whether these acts were knowingly or wilfully committed, but whether, under the circumstances, there was gross negligence and inattention.

This decision was by a divided court, Mr. Justice Harlan, Mr. Justice Gray, Mr. Justice Brewer and Mr. Justice Brown dissenting.

In the dissenting opinion Mr. Justice Harlan argues for a higher standard of duty and it seems to us with forcible argument and upon recognized authority.

Speaking of the manner in which these directors had performed their duties, he says: (p. 168)

"Upon this theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer to its business diligently and honestly, turn over

all its affairs to the control of some one or more of its officers, and never go near the bank again unless they are notified to come there, or until they are informed that there is something wrong; and when it is ascertained that these officers, or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way. Such a system cannot be properly characterized otherwise than a farce. It cannot be tolerated without peril to the business interests of the country.

"We are of the opinion that when the act of congress declared that the affairs of a national banking association shall be 'managed' by its directors, and that the directors should take an oath to 'diligently and honestly administer' them, it was not intended that they should abdicate their functions, and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by 'duly authorized officers of agents' in respect to matters of current business and detail that may be properly entrusted to them by the directors, but certainly congress never contemplated that the duty of the directors to manage and to administer the affairs of a national bank should be in abeyance all-together during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents, **but the duty remains, as between the directors and those who are interested in the banks to exercise proper diligence and supervision in respect to what may be done by its officers and agents.** * * *

The case is one of supine, continuous negligence upon the part of the three directors named, in the discharge of

duties they owed to the bank and to those interested in it. No usage of a national bank, nor any authority to carry on its business through executive officers and agents, will relieve its directors from the duty imposed upon them by law of diligently managing and diligently administering its affairs, and actively supervising the conduct of its officers and agents. There was here no diligence, no supervision, but absolute inaction in respect to the affairs of the bank.* * * They ought not by accepting and holding the position of directors, give assurance to stockholders and depositors, whose interests have been committed to their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors; a fact which, of itself, shows that the abdication by directors of their duties and functions not only tends to defeat the object for the creation of such an institution, but puts in peril the interests of stockholders and depositors."

III. THE PETITIONS CHARGE THE COMMON-LAW ACTION OF DECEIT, AND ARE NOT BASED UPON VIOLATIONS OF THE NATIONAL BANKING ACT.

(Petition—Jones Record pp. 6-17)

Plaintiffs in error have quoted only such portions of the petitions as would tend to support their contention that they set forth actions for negligence and misfeasance. They have directed attention to immaterial allegations and mere matters of inducement, but omitted the real and substantial averments of the petitions.

The material allegations may be epitomized as follows:

That at the times therein mentioned the defendants acted as directors and officers of the Capital National Bank. (It was not alleged that they were directors, because it was sufficient if they acted as such.) That the Capital National Bank was a corporation duly organized, etc. (This was not material because they would have been equally liable had its organization been pretended merely.)

That acting as such directors and officers it became and was the duty of the defendants under the law, as well as the by-laws of the bank to actively and actually manage and superintend the business of the same. (The law here relied upon was the common-law.)

(The petition then states in detail some of the directors' duties, which it is unnecessary to repeat.)

That the defendants failed to perform such duties, by reason of which large loans were made to insolvent persons upon inadequate or no securiety, etc. (No specific loan is alleged, no specific charge is made against any of the defendants, nor is it alleged that the bank sustained losses by reason thereof.)

That the books were out of balance; that they allowed and permitted false balances to be made and carried on the books of the bank; that they permitted to be carried on the books of the bank, and permitted and caused to be published, statements and advertisements wherein they included as valuable, assets of the bank which were, in fact, worthless; that they permitted and continued from time to time to carry worthless notes and other assets as part of the valuable and available assets of the bank when they knew, or should by proper diligence and examination, have known the same to be wholly worthless and of no value,

and from time to time published, permitted, allowed and caused to be published to the public, and informed and represented to plaintiffs that such notes, bills reecivable, and other worthless assets were good and collectible and a part of the valuable assets of the bank, when, in truth and in fact, they knew and were in duty bound to know such statements and each and all of them to be false and utterly untrue.

That the resources of said bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements of the bank did not show its true condition in that it showed the bank was in good sound financial condition, when it was in truth and in fact insolvent, **and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the bank and its business, and all of which said facts and circumstances the defendants and each of them had full knowledge and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said bank.** (That portion emphasized is the allegation relied upon by plaintiffs in error as converting this action into one for negligence and misconduct, but it will be observed that it contains no allegation sufficiently specific to state a cause of action under Sec. 5239 Rev. St. U. S. It was merely alleged as going to the question of knowledge of the bank's condition and had particular reference to Walsh, Vice-President, who was not a director and had signed no reports.)

After said bank became insolvent, the defendants made, caused, allowed and permitted to be made, statements to

the plaintiffs and the public showing said bank to be solvent, its capital stock unimpaired and a surplus on hand and so continued to publish, cause, allow and permit to be published such statements showing it in the condition aforesaid until it was forced to close its doors on Jan. 21, 1893.

That while so insolvent they continued to pay semi-annual dividends of from 4 to 8%, and permitted said bank to continue business and receive deposits from plaintiffs and others, when they knew of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting directors, and of which insolvency plaintiffs were ignorant.

That while said bank was insolvent as aforesaid, the defendants frequently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly papers, setting forth the solvency of said bank for the purpose of inducing plaintiffs and others and the public generally, to deposit and keep money in said bank, and the plaintiff, relying upon said published statements, as it had a right to do, deposited and loaned its money to said bank as hereinafter stated.

That if it had not been for such false statements, plaintiff would not have deposited and loaned any money to said bank as it continued to do from time to time; nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid, it allowed the same to remain on deposit, when, but for said false

and untrue statements, it would have promptly withdrawn its loans and deposits before the failure of said bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said bank to be in good, sound financial condition and solvent, when in truth and in fact, it was not in good, sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said bank being insolvent as aforesaid, the defendants, for the purpose of inducing the plaintiffs and others to do and continue business with, and to loan to and deposit money with said bank, made, caused, allowed, and permitted to be made a false statement of the condition of said bank and its resources and liabilities, which statement was thereto attached, marked Exhibit A, and which statement was made, caused, allowed, and permitted to be made by said defendants, acting as such directors and officers of said bank for the purpose of deceiving the plaintiffs and others, and to induce the plaintiffs and others to do and continue doing business with said bank as aforesaid, and said defendants, on said date caused, allowed and permitted said false statement to be published in the newspapers of general circulation in Lincoln, Nebraska.

That on December 28, 1886, the defendants and each of them, acting as such directors and officers for the purpose of deceiving the plaintiff and others, and for the purpose of inducing the plaintiffs and others to believe said bank sound, solid and solvent, and to induce plaintiffs and others to do business with said bank as aforesaid, made, caused, allowed and permitted to be made, a false statement of its resources and liabilities showing said bank to be sound,

solvent and prosperous, (a copy of which is attached as Exhibit B) and caused, allowed and permitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, etc., for the purpose of, and with the intent to induce this plaintiff and others to loan money to and deposit same in said bank, when in truth and in fact said bank was not in sound, solid, safe and solvent condition, but was wholly insolvent.

That on and between July 24, 1884, and Jan. 21, 1893, the defendants with the fraudulent intent and purpose aforesaid, during all of said time made, allowed, caused and permitted to be made at different intervals false statements of the condition of said bank as to its resources and liabilities as hereinbefore alleged with the intent and purpose of deceiving the plaintiff and others as aforesaid, and caused, acquiesced in, allowed and permitted said false statements and each of them severally to be published as aforesaid.

That said statements showed, and the defendants in each of them represented that the bank was in a thoroughly sound, safe and solvent condition and was doing a flourishing business and was in all respects a safe and secure institution with which to do business and a safe bank in which to make deposits and loans of money, and that such statements were prepared and published, and were caused, permitted and allowed to be prepared and published by the defendants for the purpose of making it appear to the plaintiff and others that the bank was sound, safe and solvent and thereby inducing this plaintiff and others to believe and rely on such statements aforesaid; that they and each of them were read and looked over by the plaintiff

and that plaintiff believed them to be true and correct statements of the condition and resources of said bank.

That during said period defendants had conversations with the plaintiffs in which they represented the bank to be thoroughly safe and sound, and plaintiffs allege that believing said published statements and advertisements aforesaid and said verbal representations so made by defendants to be true and believing them to be true and relying upon the same, the plaintiff loaned to and deposited with said bank the sums of money set forth in detail in the petition.

That such statements so published and as verbally announced to plaintiffs were, as the defendants each of them well knew, and were in duty bound to know, grossly exaggerated and wholly false and untrue and that the liabilities of said bank were in each of said statements grossly shrunken and understated and the resources inflated and exaggerated, as hereinbefore stated.

That whereas, said statements and advertisements and verbal statements showed said bank to be sound, solid and solvent and doing a flourishing and prosperous business, it was in fact unsafe, precarious, and insolvent and could not pay the money owing to plaintiff and others.

That the true condition of the bank was well known to defendants at the several times they made said statements and advertisements as published and as verbally made to plaintiff, but, notwithstanding they knew its unsafe, insolvent condition and had full access to its books and accounts, and were in a position to know, and it was their duty to know the true condition of the bank, and they, and each of them should and could have known its true

condition by the exercise of ordinary care in the discharge of their duties as directors and **acting as directors**, and they, and each of them wilfully, negligently and recklessly for the purpose, and with the intent aforesaid, made and caused, allowed and permitted to be published said false statements and advertisements and **verbal false statements** for the purpose of inducing plaintiff and others to do business with, make loans to, and deposit money in said bank.

The plaintiff's knowledge of the condition of the bank was derived wholly from said published and verbal statements and that, **had said statements so published and verbally made, set out and given the true condition of said bank,** it would have appeared, and would have been shown that the bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the **plaintiffs would not have made said loans and deposits with said bank.**

That after making said loans and deposits, which were each and all made by plaintiff relying upon such statements and advertisements aforesaid, the bank suspended business and went into the hands of a receiver, and was then, and had been for many years prior thereto, and at the time of publishing said statements and making said verbal statements, insolvent and unable to meet its obligations and could not pay its debts and did not have the assets and resources that defendants represented it had, and that by reason thereof said bank could not pay, and did not pay this plaintiff any part of said sum of money except the sum specifically stated in petition, and that the remainder has been wholly lost to plaintiff by reason of the facts hereinbefore set forth.

That by reason of the facts above set forth, and the false and fraudulent statements, advertisements and representations of the defendants, the plaintiff has suffered damages in the sums specified in the petition.

We have quoted thus fully from the petition to show what a small and insignificant portion thereof has been quoted by plaintiffs in error, and that the actions were not predicated on official reports to the comptroller.

We insist it **contains all the essential elements of an action for deceit, and that it does not contain allegations sufficient to constitute an action for negligence and malfeasance in office, either under the common-law or under Sec. 5239 Rev. St. U. S.**

The allegations upon which they rely as constituting this action as one for violation of the provisions of Sec. 5239 is "that such insolvency resulted from the careless and negligent manner in which the defendants, acting as such directors and officers, managed and superintended the bank and its assets."

That the allegations contained in these petitions indicating malfeasance and misconduct in office are too indefinite to constitute a cause of action under Sec. 5239 was decided in Allen v. Luke, 141 Fed. 694.

That was a suit against directors for misconduct, etc., and it was held that the bill "should set out with particularity the acts of defendants relied on to constitute negligence or misoncduct, and the details of the several transactions should be given with such fullness as can be done by a complainant" (p. 697).

As was said in that case, "Does complainant rely on fail-

ure to attend meetings or joining in a particular vote. Defendant is entitled to a concrete statement?"

In that case the bill alleged (p. 697) "that the said directors utterly failed and neglected to perform their aforesaid official duties and each and every one of them, and that for a considerable period of time prior to said Nov. 13, 1902, as hereinbefore and hereinafter set forth, failed to give any adequate attention to the affairs of said bank and allowed the said bank to be improvidently and recklessly managed," and that the defendants "wholly failed and neglected to make personal examination into the conduct and management of its affairs and into the condition of its assets," and the court held that those allegations were too general to state a cause of action.

So far as the petitions are concerned, the existence or non-existence of a federal question in them must be determined by the averments of the petitions, and cannot, for that purpose be affected by the answer or any other pleading.

That a defendant may, by his answer, tender a federal question is conceded, but that cannot affect the nature of the action contained in the plaintiff's petition.

So must the petition control the nature of the action so far as the plaintiff is concerned, for he can introduce no evidence that does not sustain some allegation in the petition.

In these petitions there is not a hint of a possible federal question. Indeed, but for the use of the word "national" in the name of the bank, there would be nothing from which it could be inferred that the defendants were directors of a **national** rather than a **state bank.** The word

"national" is a part of the name of the bank and is not intended to indicate the nature of the corporation, much less the source of its creation, and the fact that Section 5243 Rev. St. U. S. provides a penalty for the use of the word "national" by any other than a national bank, is not conclusive because the bank might conclude to pay that penalty rather than forego the use of the name.

But however that may be, the use of the word "national" is of no controlling force, and does not impliedly tender or allege the statutes by virtue of which it became a corporation, so as to require the court to take notice of the federal character of the corporation.

Oregon Short Line & Un. Ry. Co. v. Skottowe, 162 U. S. ~~489~~ 490; 16 Sup. Ct. 869.

Oregon Short Line & Un. Ry. Co. v. Skottowe, supra, was action brought in a state court against the Railroad Company for personal injuries alleged to have been caused by negligence of the defendant Company. It was contended that when the declaration alleged that the defendant Company was an incorporated Company, it thereby tendered or impliedly alleged the charter including all statutes and grants of power by virtue of which it acquired the right to become a corporation, and exercise corporate powers, and that when the plaintiff alleged that the defendant was a corporation duly organized, she was deemed to have alleged the entire legal history of the Company, and particularly the Acts of Congress creating the corporation which thereby entitled defendant to remove the case to the circuit court.

Discussing this question, Mr. Justice Shiras says:

"We think the unsoundness of the proposition relied upon by the plaintiff in error may be sufficiently shown by the very test which its counsel suggest, namely, what facts would it be necessary for the plaintiff to prove, to maintain her action? * * * To justify a recovery in such a case, it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendants' corporate powers. **The defendants' liability did not arise out of its grants of rights and privileges from the several territories, or from the United States. It grew out of its negligence and misconduct in the management of a railroad in the State of Oregon, into which state it is not pretended that it entered by reason of anything contained in any act of congress. * * Whether the defendant was a corporation de jure or de facto was, in a case like the present, of no importance."**

The principle therein announced applies precisely to this case.

The defendants' liability grew out of the acts of fraud committed by them, and not through the grant of any privilege in the National Banking Act.

If the word "national" were in itself sufficient to transform this action into one under the National Banking Act, then no action for deceit could ever be maintained against the director of a national bank for his official position could not be alleged without stating the name of the corporation.

The petitions do not allege that the defendants were directors of a national bank, nor that the duties referred to were imposed by a federal statute, nor that the defendants were in fact directors at all, but that they "acted as directors and officers of the Capital National Bank, a corporation, etc." and that acting as such directors and officers they did the things complained of.

While it was unnecessary to allege that the bank became insolvent by reason of the negligence of the defendants, it certainly cannot affect the nature of the action. To allege the bank's insolvency was necessary to state the cause of action. To go further and allege the cause of its insolvency may have been unnecessary, but it will not do to say, that if we were injured by misrepresentations as to the bank's solvency, the directors are liable in damages if they are not to blame for its insolvency, but not so, if it were wrecked through their dishonesty and mismanagement.

The petitions disclose clearly that they do not predicate the cause of action on negligence or mismanagement of the defendants, but on the false statements, because, by direct averments they say that **if it had not been for such false statements, they would not have deposited and loaned any money to the bank nor allowed the same to remain there, but on account of the false statements, they did deposit it and permitted it to remain, when but for said false and untrue statements they would have withdrawn their money and that they were prevented from doing so by reason of the false representations.**

The duty with which we charge the defendants was not predicated upon the statute, but based on the common-law. Unless they owed us this duty, and unless we had a right to rely upon it, we could have no action for deceit.

That duty was one at common-law. It required no statute, state or federal, and certainly none is declared upon in the petition.

Besides, the petition having been filed in a state court, if reference to any statute is to be assumed, it must be a state rather than a federal one.

It is elementary that the facts giving the federal courts jurisdiction must affirmatively appear from the plaintiff's own statement.

Hanford v. Davies, 163 U. S. 279; Tennessee v. Union Bank, 152 U. S. 454.

And where there is doubt as to the pleader's meaning, the averments will be resolved against, rather than for the claim of federal jurisdiction. Plant v. Harrison, 101 Fed. Rep. 307; Fitzgerald v. Mo. Pac. Ry Co., 45 Fed. Rep. 812.

Can it be said that this petition affirmatively shows the gravamen of plaintiffs' charges to be a violation of the National Banking Act? Or that the allegations are so free from doubt as to be applicable to federal statutes alone?

The truth of the matter is that the allegations of the petition complained of are merely introductory to and a part of the recital of **deceit** which constitutes the **real cause of action.**

Plaintiffs sought recovery, not because the defendants had violated the National Banking Act, nor that they had been guilty of any acts of negligence or misfeasance, but that they had defrauded them. And the method which they had pursued, was to permit the bank to become insolvent, to sanction and conceal the padding of its assets, and finally to give out false reports and statements of its financial condition. That some of these acts are prohibited in the National Banking Act may be true(though that does not appear from the petition) but they are not relied upon as such, but are alleged rather in that they are successive steps in the process by which the plaintiffs were fraudulently induced to deposit, and these other matters are re-

cited merely by way of explaining how the process began, and the fraud was perpetrated.

These allegations were pertinent with reference to the liability of Walsh, who was a defendant in these cases. He was Vice-President during the entire existence of the bank, but **was never a director and signed none of the reports.** It was plaintiff's contention that the bank was so obviously insolvent, its management so negligent and dishonest, its books so palpably false, that it would have been discovered by a man of ordinary prudence, whose duty it was to know. That Walsh was presumed to know of the reports that were published and that they were false, and hence that he was presumed to have participated in the false representations in the absence of proof to the contrary.

Verdict was returned against him, but the court rendered a judgment in his favor, notwithstanding the verdict. But this condition did not exist as to the remaining defendants, because they had each signed numerous statements.

As was said in Stuart v. Bank of Staplehurst, 57 Neb. 576:

"Some of the acts declared upon may have been violations of the National Banking Act, but they are not relied upon as such, nor was a remedy sought under said act."

The petition which the court was then construing was the original petition in this case.

The argument of plaintiffs in error assumes that this is an action for a violation of Sec. 5239, and that therefore the damages arising, constitute assets of the bank, and that such suit must be brought by the receiver.

Assuming that all suits for damages sustained by virtue

of Sec. 5239 must be brought by the receiver, how can it be contended that plaintiff's petition bases its cause of action on a violation of that section?

It is argued that no recovery can be had under that section, unless there has been a violation **knowingly** or **wilfully** made.

Let us assume that in this case the bank became insolvent without any fault whatever on the part of the directors, but that the only wrong committed lay in the fact that the directors in a private communication falsely represented the financial condition of the bank, by reason of which depositors were induced to place their money in the bank and thereby sustained loss and damages. Accepting the theory of plaintiffs in error as correct, they must concede that in the supposed case there has been no violation of any federal law because there has been no act of wrong-doing **wilfully** or **knowingly** made, yet can it be said that in such case a depositor would have no cause of action? The question is its own refutation.

If then, an action would lie on behalf of a depositor against a director who was innocent of the bank's insolvency, would it be just to say that because the director had also been the instrument of its insolvency, he should therefore not be liable in damages.

Here the cause of action never was and never could be an asset of the corporation. It grew wholly out of injury done the plaintiffs. Out of a thousand depositors they are perhaps the only ones who ever suffered as a result of these false reports and statements and the legal reparation for those injuries is their sole asset.

The contention of plaintiffs in error is, that this cause

of action is an asset of the bank to be ratably distributed among all creditors. Upon what theory can the law take the reparation for damages sustained by one depositor and pro-rate it among creditors who are not entitled to it? Unless a creditor was induced to deposit his money by a similar false representation he would have no cause of action.

Moreover, the injury of which we complain never could become an asset of the bank. The bank has not been injured in any way. If the allegations of fraud and deceit are true, the bank profited by the act of the directors, because, by means of these false statements the plaintiffs were induced to deposit their money, by reason of which the bank was directly benefited. How could the receiver sustain an action against the directors in an action of this nature?

Neither is it true that the effect of this action is to appropriate the assets of the corporation to the exclusion of other creditors. This action has nothing whatever to do with the corporation nor its assets. In fact, as shown by the record, the charter of the bank has been forfeited, the stock assessment provided for by the National Banking Act has been made and paid long ago, the bank's affairs settled and the receiver discharged. Hence the directors are not further liable to the corporation.

Plaintiffs in error complain that if these actions can be maintained it necessarily follows that every other creditor can recover for the same reasons. This is true only if they have been similarly defrauded. In answer to this suggestion we can not do better than repeat the language used in

Bartholomew v. Bentley, 15 Ohio, 659, quoted with approval in Prescott v. Haughey, 65 Fed. Rep. 657:

"It is first said that to allow bill holders, who have been defrauded, to sue the members of the company individually at law will produce endless litigation, and when applied the remedy cannot by any possibility do equal justice to all the creditors or to the members of the company.

"It may be that numerous suits will be prosecuted. * * * And yet the doctrine that because they have cheated thousands they are safer than they would be if only one man had suffered does not obtain in courts of justice. * * * Again, it is said the fund sought is a trust fund, and a bill in chancery is the proper remedy. There would be much propriety in the position, were it in point of fact true that a party who has been defrauded by another has no redress save out of the fund composed solely of the proceeds of the imposition. In that case strict equity might require that all those whose injuries had been the source of the fund should share equitably in it. But the rule that a person sustaining damage by fraudulent acts of another can only look to a particular fund of the wrong-doer for redress never existed anywhere."

Plaintiffs in error quote Justice Shaw in Smith v. Hurd, 12 Metcalf, 371, wherein he says:

"If this can be done, the policy of the National Banking Act, providing for a ratable distribution of all the assets among the various creditors, would be defeated, and the assets in the nature of such damage be wasted in fruitless and expensive litigation in the multiplicity of suits."

That language is not applicable to the facts in these cases, because as before shown, the cause of action of these depositors was never and could never have been an asset of the bank.

As well say, that directors shall not be liable in an action for libel, slander, or false imprisonment, because it might

affect their solvency and consequently their ability to respond to the bank in the event of an assessment on their stock. If they are to be absolved from liability for the commission of one tort, why not all!

As well say the criminal code of the State shall not apply to them because it might interfere with the operation of the bank.

Plaintiffs in error suggest that if these suits can be maintained it follows that the directors had the right to pay the plaintiffs the amount of their respective claims and could prefer these plaintiffs as favored creditors and give them the whole amount of their claims, even if it rendered the defendants unable to pay the claims of other similar creditors and that this would be a violation of Sec. 5242 prohibiting preference and Sec. 5236 requiring ratable distribution.

This contention might be tenable if our cause of action were an asset of the bank or grew out of a transaction that was an injury to the corporation, but neither of these assumptions are true.

Since the action is against the directors in their individual capacity, they stand in the same position as any individual who has committed a fraud. If he has cheated thousands and his means are not sufficient to compensate them all, it may be that those who come first will fare best, but this argument does not prove that he shall not be liable to any.

To place upon the petition the construction contended for by our adversaries, would lead to an absurdity, because it must be concluded that the pleader intended to state a cause of action he could not maintain, instead of one which he might sustain. ,

This court is asked to hold that the petition declares upon a violation of Sec. 5239, which the receiver alone can bring, and that therefore our petition states no cause of action; instead of holding that it charges an action for deceit which we may maintain.

If a pleading may be so interpreted as to set forth a good ground of action, that interpretation should be given in preference to one which would exclude such ground and lead only to an absurdity. Olcott v. Carroll, 39 N. Y. 436; Marshall v. Shafter, 32 Cal. 177; 4 Ency. P. & P. 762.

The comparison between this petition and the one in Bailey v. Mosher, 63 Fed. Rep. 488, will be discussed when we come to consider the question res judicata urged in the Bailey case.

To allege what were the duties of the directors under the law is a conclusion of law, which follows from the allegation that they were directors of a banking corporation, and need not to have been pleaded. Bell v. Scherer, 12 Neb. 409.

And mere conclusions of law in a pleading will be disregarded. Woodward v. State, ex rel Thomssen, 58 Nebr. 598.

Under the code, pleadings are to be liberally construed and, if with such construction, a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should not be sustained. Pefley v. Johnson, 30 Neb. 529.

"The very object of the new system of pleading is to enable the court to give judgment according to the facts stated and proved, without regard to the form used or to the legal conclusions adopted by the pleader." 4 Ency. P. & P. 557, and cases cited.

We think the language of Mr. Justice Shiras in Oregon Short Line & Un. Ry. Co. v. Scottowe, ubi supra, applicable to our petition.

That these petitions state merely the common-law action of deceit has long been the settled doctrine of Nebraska. Stuart v. Bank of Staplehurst, 57 Neb. 576; Gerner v. Mosher, 58 Neb. 135; Gerner v. Mosher, 61 Neb. 100.

In fact the petition in Stuart v. Bank of Staplehurst, supra, was the original petition in these cases. (Jones Record pp. 60-66.)

The identical petition was before the court in Bailey v. Mosher, 74 Fed. Rep 15, where these cases were then pending on removal.

Plaintiffs moved to remand them to the state court for the reason that the petitions did not raise a federal question.

The motion was sustained. Shiras, J., deciding that "an action against directors of a National Bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the comptroller of the currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the constitution or laws of the United States, of which the federal courts have jurisdiction, either originally or by removal."

The same petitions as amended by interlineation (Jones Rec. pp. 8-144) were before the Circuit Court of Appeals in Jones v. Mosher, 107 Fed. Rep. 561.

Plaintiffs in error insist that that court did not hold that the petition as then amended by interlineation stated

the common-law action of deceit, but that the opinion of Thayer, J., was predicated solely on the theory that the right to removal had been waived. An examination of the opinion will disclose otherwise.

Among the questions involved in that decision was: (1) whether "the interlineation made on March 16, 1899, did not change the nature of the cause of action which was counted upon by the amended complaint," (p. 564), and (2) if "the second complaint differed from the first or original complaint as respects the cause of action stated therein,, (p. 565).

Of these propositions Thayer, J., delivering the opinion, says (p. 565):

"We have made a careful examination of the complaint as it stood both before and after it had been changed by interlineation, and such comparison has satisfied us beyond a reasonable doubt that such interlineations as were made by leave of court on March 16, 1899, were unimportant and effected no change in the cause of action."

It will be observed the petitions charge verbal representations.

While it is contended the evidence did not sustain these allegations, yet, for the purpose of construing the petition it should be assumed that every material allegation, well pleaded, was sustained by sufficient evidence.

All of the evidence is not contained in the printed bill of exception and this court will not review the testimony to ascertain if it is sufficient to sustain the verdict and judgment in the state court.

Such verbal statements were entirely outside of any requirement of the Banking Act, as was the card published

in the daily papers, (Bill of Ex. p. 25), yet, in themselves would have been sufficient to subject the directors to an action for fraud and deceit.

It is insisted that our petitions are substantially like the petition in Bailey v. Mosher, 63 Fed. 488; that the latter was held to charge malfeasance and misconduct in office in violation of Section 5239, and that therefore the state court erred in construing the former as setting forth an action for fraud and deceit.

If the alleged similarity be true, then it was the Federal and not the State court which erred.

An examination of the petition upon which the federal court based its decision will disclose that it contained several allegations that are not contained in the petitions in these cases, and that it was the very allegations that are now omitted, upon which the federal court based its construction. Thus it was alleged (Bill p. 258) that the bank "was duly organized and incorporated under and by virtue of the banking laws of the United States"; that the bank became insolvent and was taken possession of by the comptroller of the currency; that in compliance with the laws of the United States and upon order and direction of the comptroller they made statements as required by law to the comptroller of the currency; that in violation of the National Banking Act the defendants made the following excessive loans: E. W. Mosher, $109,000; Charles W. Mosher, $78,000; Richard C. Outcalt, $53,000, and paid dividends when there were no profits, the petition closing with the words that (Bill p 264) "by reason of the several violations of the Banking law as above set forth by the several defendants they have become

and are liable to this plaintiff for the damages he has sustained by reason of their said acts."

Speaking of this last averment, Caldwell, C. J., says, 63 Fed. 489:

"In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that his cause of action does not arise under a law of the United States. * * * (p. 490) The plaintiff was not bound to state the legal effect of the facts set out in his petition, but having done so, he cannot complain if his adversary, and the court accept and act upon his own theory. * * * If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, **the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the violations of the banking law therein set out.**"

Plaintiffs in error criticise the opinion of the state court in the cases at bar, in that in its construction of these petitions, it was controlled by averments of legal conclusions therein contained, but it will be observed that it is the opinion of Caldwell, C. J., and not Albert, commissioner, that is vulnerable to this criticism.

The Circuit Court of Appeals, as evidenced by its own opinion, based its construction of the petition upon the allegations that **the wrongs complained of were grounded on the violations of the National Banking Act**, and that they were precluded from spelling out an action for deceit **by reason of a positive statement of plaintiff to that effect.**

We think the language of Albert, Commissioner, in the opinion in these cases, very apt and cogent where, (Jones Rec. p. 91) after reviewing the opinion in Bailey v. Mosher, supra, he says:

"From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition, which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance, resulting in damage to the bank. This very allegation, it held, precluded it from 'spelling out' a cause of action for deceit. If those allegations are to be held of such importance when included in a petition, it seems to us that their omission, and the studied omission of direct reference to the federal banking law from the petitions in the cases at bar are equally significant. Besides, it was expressly held in Jones v. Mosher, et al, 107 Fed. 561, that the petition involved no federal question; consequently it presented no case arising under the federal banking law. **It, and the other petitions before us, do state a cause of action for deceit.** We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as he has pleaded facts sufficient to constitute one which he could maintain."

This is the language upon which plaintiffs in error base their contention, that the state court, in construing the petitions in these cases, was controlled or governed by the legal conclusions of the pleader.

The opinion is most able and convincing and in itself an unanswerable argument to every contention of the plaintiffs in error.

It needs no defense at our hands.

IV. THE CASES WERE TRIED AS ACTIONS FOR FRAUD AND DECEIT, AND NOT FOR NEGLIGENCE OR MALFEASANCE IN OFFICE.

Instructions of the trial court. (Jones Rec. pp. 27-36.)

The contention that the trial court tried these cases as

being for negligence and mismanagement is not sustained by the record.

Defendants quotation from paragraph 5 of the trial courts instructions is not only a small portion of the Instruction, but is incorrectly punctuated, (after the word "recover" there should be a period instead of a semi-colon) and conveys an erroneous impression of its purport.

The paragraph taken as a whole shows that the trial court tried the cases on the theory that they were for fraud and deceit. We quote (Jones Rec. p. 29).

"Each of the several plaintiffs allege that the defendants mentioned in said several petitions were the officers and directors of the Capital National Bank, doing a banking business in the City of Lincoln, and that by reason of the statements made by such officers and published in the Nebraska State Journal, and the Evening Call, newspapers alleged to be published in Lincoln, of the condition of said bank and showing said bank to be in a solvent and prosperous condition, the said several plaintiffs were induced to, and did deposit the several sums of money above indicated to you, in said bank, relying upon said representations so published as to the solvent condition of said bank.

And the plaintiffs allege that statements of its condition showing the solvency and soundness of said bank were published at divers and sundry times from the year 1886, down to and including December 9, 1892.

And the plaintiffs severably allege in their several petitions that said statements as to the condition of said bank were at all times during said period wholly false and untrue, and that in fact and in truth said bank was not at any of said time or during said period solvent and in sound condition, but was in fact and in truth in an insolvent condition.

And the plaintiffs severally allege that the resources of said bank were stated in said several statements published by the said defendants grossly exaggerated, and inflated, and stated to be greater than in truth they were, and that the liabilities of said bank at all times was by said published reports made to appear less than said liabilities of said bank

really were, and that much of the nominal assets of said bank, such as its Bills Receivable and Stocks and Bonds were, while represented by said reports to be assets of value, in fact worthless and uncollectible, and of little or no value. And that its liabilities were much greater than was represented in said statements so published or permitted to be published by the said defendants.

That by reason of the worthlessness of said assets and by reason of the excess liabilities, and by reason of the mismanagement and inattention, and gross negligence of the defendants the said bank about the 21st day of January, 1893, suspended business, closed its doors and was taken possession of by a receiver. And that by reason of the premises the plaintiff lost the sums of money severally, at that time on deposit in said bank as hereinbefore set forth."

In paragraph 7 of its instruction, the court states the issue as follows:

"These allegations of the petitions and denials set forth in the answers constitute the issues to be tried in these cases. And the burden of proof is therefore upon the plaintiffs to show by a preponderance of the testimony the truth of the allegations contained in their several petitions.

In other words the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank from time to time during its existence as by the plaintiffs severally alleged; to show that the plaintiffs each for himself, or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say that said bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and extent as to impair its solvency."

Paragraph 8 showed that the court considered this no action for mismanagement. It recognizes the principle (as we allege in the petition) that although the bank was insolvent at all times, no matter whether through negligence or otherwise, that this would not entitle plaintiffs to recover,

but that in addition they must prove the elements of an action for deceit. We quote: (id. 30).

"The mere fact that a bank was insolvent at any time, or at all times, standing by itself, would not entitle the plaintiffs or any of them to recover. The mere fact that it was insolvent at any time or at all times, and that statements were published by the defendants or any of them which were essentially false, would not entitle the plaintiffs or any of them to recover. The plaintiffs, and each of them in addition to proving both the above propositions must in addition thereto prove by a preponderance of the testimony that such published statements of the condition of the bank came to their notice, and was relied upon by them, and that they acted in reliance upon them in making the loans to or deposits with said bank before they could recover from the defendants or either of them.

The mere fact, however, that other inducing causes operated together with the foregoing considerations such as the obtaining of a higher rate of interest would not render the defendants or any of them less liable, provided always that such plaintiffs had notice of and relied upon the truthfulness of the published reports."

Paragraph 17 is a clear and concise statement of the common-law duty of directors and refers to no duties imposed by federal statute.

Paragraph 16, quoted in brief of plaintiffs in error, applied solely to the defendant Walsh. It was our contention, to paraphrase the instruction of the court, that if the embezzlements, misappropriations or falsifications were of such great extent and of such long continuance as would upon reasonable examination challenge the attention of an ordinary prudent business man, then the jury would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement or falsification.

As will be observed, the instruction deals solely with the

question of notice. It refers to such of the defendants as did not actually or actively participate in the misrepresentation, but who, by reason of their opportunity and their duty, might be held or assumed to have participated or acquiesced in the fraud.

The jury were not instructed to base a verdict upon any misappropriation or embezzlement, but were merely authorized to find that an officer (Walsh) had notice of what the bank was doing.

Upon the same theory the trial court gave instruction 1 requested by plaintiffs.

Under this instruction the jury returned a verdict against Walsh. He, however, filed a motion for judgment notwithstanding the verdict and the trial court, evidently not being satisfied with its instructions affecting him, sustained the motion and rendered judgment in his favor. These instructions are therefore out of these cases, as they applied solely to Walsh.

An examination of the instructions **requested by defendants and refused by the trial court** will show clearly that the trial court did not consider this a suit under the National Banking Act.

Those instructions, commencing with defendants No. 3, informed the jury that the **Capital National Bank was organized under the National Banking Act, and sought to instruct them as to the directors' duties and liabilities under that act. They would have been proper were these actions for negligence or mismanagement under the National Banking Act, but, being actions for deceit, they were refused by the court and properly so.**

Evidence.

The evidence in these cases is quite voluminous and no attempt will therefore be made at an exhaustive review.

An examination of the bill of exceptions will disclose that **these cases were tried as actions for fraud and deceit and not for malfeasance in office.**

Defendants complain because investigation was not confined to the alleged false statements of the defendants, but covers the history of the bank and its transactions long before the reports complained of, and because we have gone into the management of the old Marsh National Bank; have shown the making of bad investments, and have gone extensively into detail concerning the character of the banks assets; have shown the payment of dividends out of the capital stock when there were no profits, and the loaning of vast sums without security.

It will be observed that these cases were tried in 1902, whereas the statements upon which fraud was predicated were made from 1886 to 1892.

In order to sustain our cause of action, it was necessary to prove, not only the making and publication of the statements, but that those statements were false and did not truly state the bank's actual condition at the times they were made, and to show that at the very date stated in those reports the bank was insolvent.

Proof of its insolvency at the date of its failure, Jan. 21, 1893, was very simple, but this did not constitute legal proof that the bank was insolvent when defendants made the statement of Dec. 9, 1892, much less when they made the statement of Dec. 28, 1886, and those intervening. There would

be no presumption that this condition extended backward.

It would have been proper, no doubt, to have taken each of the eleven statements offered in evidence, and to have shown that, at its particular date, the bank was insolvent; but in an institution which had done the business of the Capital National Bank, with its hundreds of books and maze of figures, it would have required an endless time to have accomplished this task, if indeed, it could have been done at all, for some of the necessary books of the bank were missing, such as Bills Receivable Register and Journals. It would have been well nigh impossible, and at least most difficult, to prove the solvency or insolvency of the makers of Bills Receivable included in the bank's assets, at a date ten or fifteen years prior to the time of the trial.

As there were eleven published statements introduced in evidence, the trial of the cases, had it proceeded upon that theory, would have taken months instead of weeks. (Bill pp. 20 to 35).

Instead of pursuing this method, plaintiffs adopted the course of showing specific losses at certain dates and following these up by showing that no losses were ever charged off, on the books; and relied upon the presumption, that a condition shown to exist at a certain date, would be presumed to continue until the contrary was shown.

It was therefore shown that the Marsh National Bank grew out of what was known as Marsh Bros., Mosher & Company; that the business of this Company was principally the handling of the paper of the Marsh Harvester Company, The Marsh Binder & Manufacturing Company, and various concerns at Sycamore, Illinois, owned by the Marsh's, (Bill pp. 63).

It was shown that "the assets, liabilities and accounts of Marsh Bros., Mosher & Company were transferred to the books of the Marsh National Bank and because the assets and liabilities of the Marsh National Bank," (Bill pp. 345-346), with a purported capital stock of $100,000, but that no actual cash was paid in.

Among the assets thus transferred were Bills Receivable $248,029.93; Stocks and Bonds $30,540.00; Collection Account (overdrawn) $14,573.32.

Bills Receivable, $248,029.93, consisted of paper taken by the different Marsh concerns for farm machinery. The Marsh's and all of their companies went into bankruptcy in June, 1884, and their assets did not realize sufficient to pay preferred claims of laborers; general creditors receiving nothing. (Testimony of Carnes p. 306-307; Alden p. 314 of Bill).

Mr. Alden testified that a year or two prior to the failure, the bank held at least $200,000.00 of such paper, and Mr. Carnes testified that the assets of the Marsh Harvester company by way of commercial paper was poor; that most of it was given for the sale of a "low down binder" which proved a failure and the paper which came to his knowledge was not worth over 25 to 30 per cent. of its face value. (Bill p. 313).

Stocks and Bonds, $30,540.00. It was shown that of this amount, $30,000.00 consisted of stock in the Marsh Harvester Company, which was worthless. To secrete this loss the figures "30" were erased on the ledger, leaving the net amount of Stocks and Bonds $540.00 and the account Bills Receivable raised from $248,029.93 to $278,029.93 by erasing the figure "4" and substituting "7." The books of original

entry showed no transactions whatever whereby the bank parted with any Stocks, or received any Bills Receivable, hence, it was undoubtedly a loss.

The Collection Account $14,573.32 was unquestionably a fictitious asset because there could not be an overdrawn Collection Account if honestly kept. (Bill 72). This account was diminished $10,000.00 by the erasure of the figure "1" under dates of July 2, 3 and 5, 1883. (Bill p. 72 and 73) and the account of the Omaha National Bank raised the same amount; while no such entries appeared on the cash journal or other books of the bank.

It was shown that in 1884 the bank sustained a loss of $28,174.70 on account of Donnell, Lawson & Simpson, no part of which was ever paid. (Bill pp. 46 and 47), and that after their failure—from Oct. 14, 1884, to Aug. 13, 1885, notes of that concern to the amount of $59,063.68 were discounted by the Capital National Bank; whereas it was shown by the testimony, that no such notes were ever executed or paid, and in fact were forgeries. (Bill pp. 48 and 49).

It was shown that on Dec. 14, 1885, Bills of Exchange was charged with $29,968.00 and 9 notes of the Marsh's aggregating that identical amount indicated as paid, when in fact the Marsh's were insolvent in June 1884 and paid not a cent of their indebtedness.

It was shown that notes of the First National Bank of Hastings, $10,000.00, First National Bank of Kearney, $10,000.00, F. S. Johnson & Company, Milford, $9,968.00 were discounted by the bank and appeared as a part of its assets, when in fact no such notes were ever given by the purported makers. They also were forgeries. (Bill pp. 43 and 44).

It was shown that fictitious credits to the account of "Inter-

est Paid" were made amounting to $115,016.44, (Bill p. 80). The effect of these entries was to increase the apparent net earnings of the bank and afford a basis for declaring dividends.

It was shown that at different dates, certificates of deposit, purported to have been issued to J. E. Hill as follows:

Cert. No. 24452, $100,250.00 (Original Ex. 140).
Cert. No. 24927, $14,650.00 (Original Ex. 121).
Cert. No. 24941, $10,000.00 (Original Ex. 124.
Cert. No. 25097, $50,000.00 (Original Ex. 145).
Cert. No. 21379, $50,000.00 (Original Ex. 146).
Cert. No. 25636, $50,000.00 (Original Ex. 141).
Cert. No. 25861, $38,114.75 (Original Ex. 142).

and aggregating in amount, $263,014.75, were paid by the bank, when in fact nothing was deposited on account of them and the certificates themselves were fictitious and merely used to abstract that amount of money from the bank. (Bill pp. 300-305).

It was shown that in many cases large certificates of deposit were paid, purporting to have been issued for one amount, when the books of the bank indicated it had received a much iesser amount on account of the certificate so issued.

The following is a schedule showing such instances:

Cert. No.	Payee				Bank Paid	Bank Received when issued
17900,	C. H. Willard, Tr.,	Ex.	1036, Bill, page	199	$40, 000 .00	.00
9272,	G. M. Bartlett,	Ex.	Bill, page	199	100.000 .000	5.00
24379,	J. E. Hill, Tr.,	Ex.	146, Bill, page	82-85	50,000 .00	100.00
21366,	G. M. Bartlett, Tr.,	Ex.	Bill, page	199	50,000 .00	5.00
23593,	J. E. Hill, Tr.,	Ex.	139, Bill, page	85	40,000 .00	100.00
24471,	D. B. Welch,	Ex.	115, Bill, page	85	10,000 .00	1.50
24574,	P. F. L. Ashton,	Ex.	111, Bill, page	199-200	1,500 .00	300.00
24653,	C. Hammond,	Ex.	109, Bill, page	86	5,000 .00	100.00
24707,	John A. T. Hibbs,	Ex.	113, Bill, page	86	3,000 .00	300.00
24806,	Cassius S. Wenn,	Ex.	112, Bill, page	86	2,100 .00	100.00
24866,	Austin Humphrey,	Ex.	116, Bill, page	86	4,500 .00	500.00
24973,	J. E. Hill, Tr.,	Ex.	121, Bill, page,	87	14,650 .00	4,650.00
24941,	J. E. Hill, Tr.,	Ex.	124, Bill, page	87	10,000 .00	5,000.00
24981,	A. P. S. Stuart,	Ex.	119, Bill, page	87	2,000 .00	20.00
24986,	H. R. King,	Ex.	118, Bill, page	87	7,000 .00	1,000.00
25047,	J. E. Hill, Tr.,	Ex.	144, Bill, page	87-88	37,975 .00	975.00
25056,	Harper Notes,	Ex.	120, Bill, page	88	7,000 .00	1,000.00
25097,	J. E. Hill, Tr.,	Ex.	145, Bill, page	88	50,000 .00	50.00
25380,	Hattie E. Carson,	Ex.	126, Bill, page	88	1,100 .00	100.00
25636,	J. E. Hill, Tr.,	Ex.	141, Bill, page	88	50,000 .00	100.00
25691,	D. B. Welch,	Ex.	122, Bill, page	88	10,00 .000	100.00
25861,	J. E. Hill, Tr.,	Ex.	142, Bill, page	88	38,114 .75	114.75
25862,	J. E. Hill, Tr.,	Ex.	143, Bill, page	89	37,114 .75	114.75
25933,	Mayer Bros.,	Ex.	114, Bill, page	89	11,000 .00	1,000.00
26818,	1st Nat. Bank Poultney,	Ex.	Bill, page	89-90	5,000 .00	3.00
27401,	George Olcott,	Ex.	Bill, page	90	5,000 .00	1.77
27978,	LaSalle National Bank,	Ex.	Bill, page	90	5,000 .00	3.00
28009,	LaSalle National Bank,	Ex.	Bill, page	90	5,000 .00	3.00
	Total amount received by Bank					$15,940.77
	Total amount paid out by Bank				$602,054 .56	

In these transactions the bank sustained losses aggregating $586,107.73.

Certificate No| 24452 for $100,250.00 will illustrate how some of these transactions were manipulated. During the 1891 session of the Nebraska Legislature bonds were authorized issued for $100,000.00 to aid drouth sufferers. They sold at a premium of $250.00 and on April 24, 1891, the proceeds of the bonds amounting to $100,250.00 were deposited in the Capital National Bank and credited to the open account of the Nebraska Relief Fund. (Whitmore, Bill p. 97).

This amount was all checked out by the relief committee. (Bill p. 98), but on the same day the relief fund received this credit, a certificate of deposit (No. 24452) was issued for $100,250.00 payable to J. E. Hill, Tr. This certificate was fictitious and nothing was ever received by the bank on account of its issuance, yet the books of the bank show it to

have been paid April 28, 1891, (Bill p. 97). It would be interesting perhaps to follow the history of this certificate, but would throw no light on the issues involved in this court and unnecessarily extend a brief already too large.

It was shown that from Dec. 24, 1889, to Dec. 28, 1892, the books of the bank were out of balance $100,000.00 and that a balance was forced every day during that period of time, (Bill p. 99, 100 and 137).

It was shown that from July 24, 1888, to the failure of the bank, notes of the Western Manufacturing Company aggregating $755,000.00 (Bill p. 132) were discounted by the bank, when in fact that Company was a mere fiction and had no assets; in fact, did nothing but manufacture notes, and at the date of its failure, the bank had notes of this Company aggregating $235,000.00 on which not a cent was collected, (Bill pp. 109-111; also Bill pp. 315-8). This amount was nearly equal to the banks purported capital stock ($300,000) when the maximum loan to one person should not have exceeded $30,000.00.

It was shown that from Jan. 1885 to July 1892, the bank paid out in dividends $253,000.00 and charged to surplus $32,000.00 when in fact there never was a time when the bank had any profits or was even solvent. In fact, up to July 1, 1890, it had sustained losses and impairments aggregating $877,000.00, and up to July 1, 1891, had sustained losses and impairments aggregating $1,025,196.94. (Bill pp. 203-205). When in fact, never until Feb. 2, 1892, was there a cent charged off for losses or bad debts, and then only the sum of $30,000.00 (Bill p. 139), **charged off by order of the bank examiner (Bill p. 19).**

The testimony was direct that at the date of every pub-

lished statement of its condition introduced in evidence, the bank was insolvent. (Bill p. 206), and, finally when it went into the hands of a receiver, Jan. 21, 1893, the bank's assets amounted to $180,494.52 with liabilities amounting to $1,761,062.38. The last published statement prior to this date was the one on Dec. 9, 1892, and, while it would not be exact to make a comparison between said date and the date of its failure, it is as near as we can get exact data as to the actual value of assets. A comparison of this report with the condition at the date of failure will give some idea of the magnitude of the deception and fraud, as its condition in January was, in all probability, not much worse than it had been the month preceeding.

This showed that by the report of Dec. 9, 1892, the bank had resources, total, $1,074,867.37, whereas the receiver realized on all assets of the bank $180,494.52, a difference of $894,372.85.

This same report showed its liabilities $1,074,867.37, while its actual indebtedness admitted by the receiver amounted to $1,761,062.38, a discrepancy of $686,195.01. (Dec. 1892 report, Bill p. 10-11. Testimony of McDonald, Receiver, Bill p. 324).

It was also shown that the bank carried an advertising card in the papers, in which was given the names of the officers and directors and the purported capital stock ($300,000.00). (Bill p. 25).

The evidence thus reviewed shows clearly upon what theory plaintiffs tried these cases.

Instead of having tried them as being grounded upon violations of the National Banking Act, plaintiffs always combatted that contention.

Thus during the trial, defendants sought repeatedly in cross-examination, to show that the published statements of the bank's condition were made on forms furnished by the Comptroller and in pursuance of his requirements. These questions were objected to and objection sustained on the ground that they were not material to the issue. (Bill pp. 135-137).

In the cross-examination of Mr. Whitmore (Bill p. 136) the following appears:

"Q. I will ask you whether these statements to which you have referred are made independently of the requirement of the Comptroller under the National Banking Act for the making of the same and the publication of the same in the newspapers as is required by the law governing national banks?

Mr. Thomas: The plaintiffs object as being an attempt to inject a federal question, and for the further reason that it is incompetent, irrelevant and immaterial, not proper cross-examination and asking for an opinion of the witness. Objection sustained."

So cross interrogatories concerning the bank's examination by the national bank examiner were objected to and sustained. (Bill pp. 134-136).

We are criticised for having introduced in evidence, the oaths of directors, but it will be recalled that Mr. Thompson denied having been a director when the deposits in question were made, and the oaths were offered for that reason.

Criticism is also offered for that we introduced in evidence the original reports made direct to the Comptroller, and it is argued from this, that our action was based on violations of the National Banking Act, but it is obvious that such was

not the purpose, for no liability was predicated on those reports.

It is well known that when the statement for the comptroller is prepared, another is also prepared for publication. After the latter has been published, verified proof of such publication is endorsed on it by the publisher and the statement and proof forwarded to the Comptroller, as evidence of the bank's compliance with the law.

In the cases at bar these published reports bearing proof of such publication, had been destroyed in accordance with a rule of the department. (Testimony of Major Lynch, Bill p. 3).

The defendants had denied signing, or authorizing the publication of the reports declared upon in our petition, and the reports to the Comptroller were corroborative evidence, (1) in that it represented the bank's condition to be the same as shown in the published statement, and (2), in that they were proof that the signers of the report must have been in Lincoln at the time they were made and knew of the report that was being published over their signatures.

Mr. Thompson.

Since special effort has been made on behalf of Mr. Thompson, we may be pardoned a brief reference to his testimony.

He says he always signed every report that was brought to him. Whenever he attended a directors' meeting and a report was handed him, he signed it.

When asked "Did you examine the assets of the bank to ascertain if the report correctly stated them?" he answered that he was always willing to sign any statement of the condition of the bank from the representations that were made

to him by the executive committee and the officers of the bank; and he justified it by explaining that he couldn't have told anything about it if he had examined the condition of the bank.

Q. You sign your name irrespective of the facts, you don't know what the true conditions are?

A. How could I do better?

Q. I simply want you to state this, that you are signing statements of the condition of that bank and are taking some one's else word entirely for the truth or falsity of the report?

A. That is what I am doing and I couldn't do different if I tried.

Q. And that is what you did with the Capital National Bank?

A. Yes, sir.

Q. And you didn't know at that time whether the report was true or false?

A. I couldn't have known.

Q. You didn't make any effort to find out except by asking someone else?

A. I am going to answer that question right or not at all.

Q. I have a right to an answer to that question by yes or no. You didn't make any effort to find out except by asking someone else? Can you answer that by yes or no?

A. That question cannot be answered by yes or no because I did not ask someone else. They made a regular written statement of the condition of the bank and it was from that that I knew the condition of it. (Bill pp. 230-1).

So it appears that he did not even inquire of anyone as to the correctness of the reports. This is the answer of the

"man of great capabilities and of the highest character for uprightness and probity, not only of local prominence but whose distinguished services for his country have advanced him in the diplomatic service to the rank of Ambassador" whose eulogy we find on page 57 of his separate brief.

This is the man who informs us that he has been at the head of some very large institutions in Nebraska. (Bill p. 230). Who, from 1884 to 1890 was Superintendent of the Burlington Railroad; who, in 1890, in addition to the line of nine hotels which he owned, took charge of the Lincoln Gas Company, The Lincoln Electric Company, and the Farmers & Merchants Insurance Company, as an active officer. (Bill pp. 223-224) and has been President of a Bank at Aurora since its organization in 1890. (Bill pp. 224 and 233).

Is it strange that the public would have confidence in a statement of the financial condition of a bank by so able a business man? Yet he signed these statements in utter ignorance as to their truth or falsity, relying solely on others and not even asking them, and pretends to justify his action by claiming that he was too ignorant to ascertain the falsity of these reports if he had attempted to, although he says: "I organized the Aurora State Bank in 1890 and have been its president ever since." (Bill p. 224).

He published these reports to the world as correct. The depositors of the bank had confidence in his ability and integrity. They believed that he had the ability to know that the statements he signed were true and the integrity to insure himself of their truthfulness before signing them. He has betrayed that confidence by certifying that **he knows a statement to be true, when, in fact, he knows that he**

knows nothing whatever as to its truthfulness, and could not know if he tried. He cannot even excuse himself under the plea that these reports were published under the order of the comptroller because he believed they were published as a matter of advertisement, to attract business and induce confiding patrons to deposit money in his bank.

We quote further from his testimony: (Bill p. 233).

Q. You knew these reports were published?

A. Well, sir, you may smile at my ignorance, but I never knew until you read that, that the comptroller required them to be published. I knew that the banks published them, but I thought it was for their own convenience.

Q. You thought it was just for the purpose of advertising?

A. I don't think I ever thought anything about it.

Q. You never knew before that the comptroller required these to be published?

A. No, sir.

Q. You thought it was just an act of the bank itself?

A. It would be a natural thing to do.

Q. You see banks right along every time a report is called for, publish their condition?

A. Yes, sir.

Q. And you notice these attested by the directors?

A. Yes, sir.

Q. And signed by some official of the bank?

A. Yes, sir.

Q. And yet you thought all this time that it was an act of the bank's itself?

A. I never thought anything about it, there has not been any reason why I should have given that any weighty

thought, my banking experience is nothing at all. Now while I have been president of this little bank up here at Aurora ever since its organization, if I went into that bank today and tried to tell from its books what the condition of the bank was, if my life depended on it, I couldn't do it.

Q. Notwithstanding, you are willing to sign your name to reports and let people believe them?

A. Let me tell you this, Mr. Lawyer, I don't know how many banks there are in this town, but I will just wager you a new hat, I'll just bet you that there are not three directors in this town that can tell you anything about their banks.

Q. You could tell if a column of figures was footed up right?

A. I might laboriously go through a column of figures.

Q. I suppose you could tell if a knife had been used on a book to scratch out figures?

A. Of course, I am not trying to protect myself from anything that legitimately belongs to be (me) to bear, but I am simply trying to tell you things that you already know, Mr. Thomas.

Q. I believe you said that you didn't know that the bank ever carried any paper of C. W. Mosher's?

A. It never came to my attention at all that Mr. Mosher had any paper in the bank, I never had any means of knowing it and I have no recollection of hearing anybody say that he had.

(At the time of its failure the bank had $85,281.67 of C. W. Mosher's notes (Bill p. 325) which were worthless, and $107,085.45 of E. W. Mosher's (Bill p. 325).

Q. And you didn't know they carried any paper of Outcalt's?

A. No, I never.

(Bank held $54,166.66 of Outcalt's notes (Bill p. 326).

Q. You didn't know that they carried any paper of the Western Manufacturing Company No. 1 of which Mr. Hurlbert was manager?

A. Well, no, and if I understand that thing, I question if anybody could have told, I understand that all those notes were carried by numbers there instead of in the name of anybody.

Q. You claim you didn't know that there was such paper in the bank?

A. I did not know it, no, sir.

($755,000.00 of these notes passed through the bank during a period of four year. (Bill pp. 132, 109, 111, 315-8.)

Q. You claim you did not know anything about this Relief Fund Certificate of Deposit?

A. All I know of that relief fund is that the legislature passed a law appropriating that much money and that Mosher was treasurer of that association. That is all I know.

Q. And you never inspected the books of the Capital National Bank yourself?

A. No, sir.

Q. Never looked at them for a moment in your life?

A. I don't think I ever looked at them at all; I know I never did.

Q. Never examined any of the accounts in there?

A. No.

Is this the extent of diligence the depositors of this bank had a right to expect from this eminent and able business

man? His sole diligence seemed to consist in assisting to declare dividends. (Bill p. 241.)

He thought the bank was doing a flourishing business, yet in 1891 sold his stock to Mr. Mosher (id. p. 242). He supposed at that time Mr. Mosher and Outcalt's notes for $150,000.00 would have been good without security, yet, notwithstanding they were reputed to be millionaires, he secured his sale of stock of the value of $22,500.00 with 350 shares of gas stock of the par value of $35,000.00.

He brands Mosher and Outcalt thieves (id. 230), and he would not be surprised at anything that Mosher might have done (id. 234); says he disposed of his stock on account of personal trouble with Mr. Mosher (id. 242), yet, on Dec. 27, 1892, (the bank failed Jan. 21, 1893) Mr. Mosher executes to him a mortgage on "two onyx top gilt tables, one mahogany table, 1 mahogany cabiet, 1 blue satin corner chair, 1 gold colored reception chair, 1 oval back red and gold easy chair, 1 large upholstered velvet trimmed lounge, and numerous other things of that character" (id. 243).

On Dec. 24, 1892, Mr. Outcalt, cashier, for a recited consideration of $12,500.00 executed to Mr. Thompson a chattel mortgage on about 29 head of horses, 5 carts, 1 light wagon, 100 tons of hay, 2,000 bushels oats, all harness, horse boots, 2 sulkies, located on his farm 5 miles south of Lincoln (printed record 249-50).

On Dec. 27, Mr. Mosher (president) executed to Mr. Thompson a chattel mortgage on his entire household goods, the items of which are too numerous for repetition but appear on pages 250, 1 and 2 of the record; also some buggies, harness, horses, etc. Both of these mortgages were filed for record Jan. 23, 1893.

Mr. Thompson claims he was not at home when these mortgages were given, but let us examine his testimony.

About the same time these mortgages were executed, Mosher and Outcalt deeded to Mr. Thompson ten or twelve tracts of land in Lancaster, Hamilton and York counties, (Bill pp. 244-5 and 6).

Q. Were you here when the real estate conveyances were made to you?

A. Yes, sir, but I did not think that ever there was any reason for going into that thing.

Q. As a matter of fact didn't Mosher deed to you the northwest quarter of 24-9-6, Lancaster county, and did you recite the consideration as $10,000.00?

A. You mean Outcalt?

Q. Yes.

A. Yes. * * * (Bill p. 244)

Q. And wasn't there a deed made to you conveying the northeast quarter of 12-12-5 in Hamilton county?

A. Yes, that was all one transaction.

Q. And one for the southwest quarter of 31-10-1 in York county?

A. Yes, sir.

Q. And another reconveying the title to the S. W. 31-10-1, York county?

A. I couldnt say the numbers you are reciting was right or wrong, but the whole transaction was as I have told you.

Q. How many pieces of land were included in that transaction?

A. I couldn't tell you.

* * * *

Q. About how many acres were there?

A. Oh, I couldn't tell you about that; there might have been five or six pieces of land, I don't know.

Q. And there might have been ten or twelve?

A. There might have been; I couldn't tell how many there were.

Q. You say when this deed from Outcalt was made December 29, 1892, you were in Lincoln?

A. No, I did not.

Q. Didn't you just testify to that a moment ago, that when the deed from Outcalt was made to you that you were in Lincoln?

A. I don't think so.

Q. Well what are the facts?

A. I said that was given me, that this stuff up here was given me a couple of months or such a matter before the failure of the bank in exchange for this gas stock.

Q. Isn't that deed dated, the deed to the N. W. 24-9-6, isn't it dated December 27, 1892?

A. Yes it was and I'll tell you why. When Mullen came to have that recorded he found that there was no date on it at all and I remember now of his telling me that he put a date on that. Now the date—I don't know what date he put on, but there was a date filled in because there was a date belonged there. * * *

Q. Well, did you record any of those deeds until after the failure of the bank?

A. No, I think Mullen recorded them all, sent them for record while I was away. (id. p. 245)

Q. While you were gone?

A. Yes, sir.

Q. After the bank failed?

A. No, I think this is what Mullen told me, when I came home, that Mosher had come over and told him that those deeds that I held ought to be recorded and I think he sent them up for record before the bank failed, on Mosher's telling him that they ought to be recorded.* * *

Q. Isn't it a fact that the deed to some Hamilton county land was recorded January 18th, 1893?

A. That might have been.

Q. And wasn't there a deed to the S. W. 31-10-1 in York county to you executed by Mosher filed for record January 14, 1893?

A. I don't hardly see how that could have been, and yet I would not say it wasn't.

Q. You were here on or about the 14th day of January, 1893?

A. That would be nine days before—I don't know that I wasn't.

Q. On that day didn't you make a deed to Mosher to the S. W. 31-10-1 in York county?

A. Yes, and I will tell you how that was done. * * *

Q. And on or about the 28th day of December, didn't Mosher and his wife, and Outcalt and his wife convey to you by deed the S. E. quarter and the south half of the northeast quarter of 19-11-2, also the southwest quarter of 13-12-2 in York county, which deed was recorded December 28, 1892?

A. Very likely that is right. * * *

Q. On January 12, 1893, you deeded to Mosher the southwest quarter of 13-12-2 in York county for a consideration of $1.00?

A. Very likely; it was a transfer of securities.

Q. And on January 7, 1893, Mosher and wife and Outcalt and wife, by deed conveyed to you the west half of the southeast quarter of 20-10-2 in York county for a recited consideration of $1,000.00 which was recorded January 14, 1893? (id. 246)

A. Very likely, it was all the same transaction.

Q. And on January 18, 1893, Mosher and wife by deed conveyed to you the northwest quarter of 19-21-1, York county, for $4,000.00 consideration?

A. Very likely, it was all the same transaction. * * *

Q. You testified that there was a date in one of those deeds that Mr. Mullen filled in?

A. There was a blank date.

Q. I will ask you if it wasnt in the chattel mortgage or the bills of sale?

A. I couldn't tell you about that, and I wouldn't pretend to say which one it was in, but I know he told me there was a blank in one.

Thus his own testimony shows that he was at Lincoln during the month or two preceding the failure of the bank.

He tells us how he was astonished when he learned of the bank's failure, and that he never had any intimation of it. (Bill p. 18)

What did he think of the letter of the Comptroller of the Currency under date of Sept. 8, 1891 (Bill p. 15) in which he states :

"The examiner reports that when your last report of condition was made to this office, you had overdrafts amounting to $55,004.47 as shown by your books, while you only reported $12,418.97, and classed the remainder as loans and discounts."

What did he think of the suggestion of the Comptroller that "**bad debts**, unless satisfactorily arranged in the meantime should be charged off prior to declaring a dividend," referring especially to an item of $14,000.00 (p. 15) or of the suggestion that premium account should be charged off as 4½ % U. S. bonds had no premium value on the market; or of the suggestion of the loss of $2,500.00 on the note of Donnell, Lawson & Simpson, which he claims was taken care of by Mr. Mosher in 1884, together with the $14,000.00 "bad debts" intended to be charged off before declaring a dividend.

Or what did he think of the further suggestion contained in this same letter (Bill 16): "The examiner reports that **your board of directors has held only two meetings during the past year, and there is no record of their having examined or approved of the loans and discounts. It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors and regular and frequent meetings are therefore very desirable,**" when, as he claims, he paid no attention to the affairs of the bank except to assist in declaring dividends.

Or the letter of Feb. 16, 1892, which is as follows. (Bill pp. 18-19):

"Treasury Department,
Office of the Comptroller of the Currency,
Washington, D. C., Feb. 16, 1892.

Mr. C. W. Mosher, President Capital Nat'l Bank, Lincoln, Neb.:

Sir: The report of an examination of your bank, made on the 26th ultimo, has been received.

The following loans appear to exceed the limit prescribed by Section 5200 U. S. R. S.:

E. W. Mosher.....$50,950.28
G. W. Small..... 51,752.53

The examiner reports that you have some loans that have been carried along for a number of years, which he thinks should be collected as soon as practicable, and includes the above excessive loans in this class. He also thinks that Mr. Mosher's liability as an endorser is too large.

The agreement of Messrs. R. C. Outcalt and C. W. Mosher to reduce their liabilities, and in future adjust all accounts so that overdrafts will be confined to those of a temporary nature, and also that they will close the bulk of their outside interests, and give their attention to the affairs of the bank, is received.

The examiner states that owing to these outside dealings the business of the bank has suffered.

Overdrafts are reported amounting to $60,936.78. Please inform me to what extent these have been reduced since the examination. The practice of allowing overdrafts should be avoided so far as practicable.

Overdue paper is reported amounting to $104,868.19, of which $14,500 is classed as "bad debts" as defined by Section 5204 U. S. R. S. Such of this overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension.

The examiner reports that losses aggregating $30,000.00, including the amount of "bad debts" reported above, were charged off during the examination.

The examiner reports that your by-laws require the board of directors to meet only twice a year, and that they often only go through the form of declaring a dividend,

and do not examine the loans and discounts. He states that you have no discount nor examining committee.

It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

It appears from the report that your bank was borrowing $137,234.16 on notes and bills rediscounted, and that it has been borrowing money continuously during the past year.

The examiner states that the amount of your borrowings have been largely reduced since his previous examination, and it is suggested that all this liability be paid off, and that the implied power to borrow money should be reserved for emergencies, and not habitually used for the purpose of procuring banking capital.

Ex. 948 P. 1.

The necessity for borrowing appears to have arisen from the excessive loans made, and your first effort should therefore be to realize on these by reducing them to the lawful limit. Special effort should also be made to collect or renew your overdue paper.

Please bring this communication to the attention of your board of directors for consideration, and for reply over their individual signatures.

C. Ex. 944. E. S. LACEY,
Comptroller."

That these letters were received and read by the directors, see letter of E. P. Hamer, and one signed by all the directors; both directed to the Comptroller of the Currency (Bill p. 4-7).

Is it not significant that Mr. Thompson disposed of

nearly all of his stock November 14, 1891, (Bill p. 248) shortly after the Comptroller of the Currency criticised the condition of the bank, Sept. 8, 1891, (Bill pp. 15-16) and that he retained just enough stock to qualify him to act as a director; thereby permitting his name to be used to lure confiding creditors into the meshes of the Capital National Bank?

Is it not significant that he should take a secured note from men whom he considered millionaires?

Is it not a circumstance of suspicion that he should be "swapping" securities with them within a month or two before the failure of the bank, when he still considered them millionaires?

Is it not strange that they, **his personal enemies**, should be thrusting upon him chattel mortgages and bills of sale of their household furniture and driving horses, and advising as to just the proper moment to record his unrecorded instruments, etc., within a short time preceding the banks failure, and never filed for record until after the bank closed its doors?

Why were they kept from the public records at all?

Mr. Thompson says he spurned the security and refused to accept it, but why was it given? Was it because the makers desired to favor a personal enemy, or did they pick upon Mr. Thompson as one most likely to assist them in getting this property out of the reach of their creditors? It at least indicates the existence of a peculiar relation, the true inwardness of which may never be known.

Mr. Thompson points to his loss as evidence of his good faith.

If this be proof, then Mosher and Outcalt are guiltless of

wrong doing, for they were bankrupted by its failure, whereas, before, they were reputed millionaires.

At the date of its failure the bank's liabilities exceeded its assets by **over a million and a half.** What became of this money? Neither Mr. Mosher nor Outcalt have it. The record shows that both of them had gone through bankruptcy several years prior to the trial of these cases. They owned no hotels, no banks, no insurance companies, electric light companies, nor were they negotiating for any gas plants.

The record does **not** disclose that Mr. Thompson has, as yet, availed himself of the benefits of the bankruptcy act.

We have not attempted a review of the entire testimony because it seems to use immaterial to the questions at issue, though, if space permitted, it would present the history of one of the most brazen and colossal frauds ever committed.

We have adverted specially to the testimony of Mr. Thompson because of the **novel** theory concerning **scienter** urged so eloquently in his brief. **Actual knowledge** can never be a matter of positive proof—it can only be inferred from established facts affording opportunity for knowledge—hence, from any view of the case, there was ample evidence to sustain a verdict, based upon the assumption of knowledge. And this, though we were to concede, that a false representation of a fact, made as within the personal knowledge of the maker, when he in fact has no such knowledge, is not knowingly false.

V. ALTHOUGH THE PETITIONS STATE MATTERS WHICH WOULD CONSTITUTE A CAUSE

OF ACTION UNDER THE NATIONAL BANKING ACT (WHICH WE DENY) THEY CLEARLY STATE A COMMON-LAW ACTION OF DECEIT, WHICH, BEING SUPPORTED BY THE EVIDENCE, IS SUFFICIENT TO SUSTAIN THE JUDGMENTS.

Assuming the petitions do contain a cause of action for negligence, they then contain two causes of action, one of which the state court has exclusive jurisdiction; the other raises a federal question. If defendants desired to have these causes separately stated and numbered they should have filed a motion to that effect, and having failed to do so they will be deemed to have waived it.

Exeter National Bank v. Orchard, 43 Neb. 581.

If a petition states facts sufficient to constitute an action for deceit, and is therein sustained by the evidence, the judgment will be sustained, although the petition also contains a federal question.

Thus in Hammond et al. v. Johnston et al., 142 U. S. 73; 12 Sup. Ct. Rep. 140, Mr. Chief Justice Fuller says:

"It is well settled that where the Supreme court of a state decides a federal question, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Again in Delaware City, etc., Nav. Co. v. Raybold, 142 U. S. 636, Mr. Justice Lamar says:

"The rule is well settled that, even if a federal question

was raised in the state court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the federal question, this court will not entertain jurisdiction. The authorities in support of this rule are too numerous for citation. We cite only a few of the more recent ones."

The justice cites numerous decisions sustaining this rule.

In Cook County v. Calumet & C. C. & D. Co., 138 U. S. 157; 11 Supt. Ct. Rep. 435, Mr. Chief Justice Fuller, delivering the opinion of the court, says:

"The rule is settled that, to give this court jurisdicition of a writ of error to a state court, it must affirmatively appear, not only that a federal question was presented for decision by the highest court of the state having jurisdiction but that its decision was necessary to the determination of the cause ,and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

De Saussure v. Gaillard, 127 U. S. 216; Johnson v. Risk, 137 U. S. 300.

In De Saussure v. Gaillard, supra, Mr. Justice Matthews says:

"It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.' Klinger v. Missouri, 13 Wall. 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided under Section 709 of the Revised Statutes, that to give this court jurisdicition of a writ of error to a state court, it must appear affirma-

tively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it," citing numerous authorities.

This case was on a writ of error to the Supreme court of South Carolina, in which the state court had actually passed upon a federal question as will appear from the following quotation:

"It thus appears that in point of fact the Supreme court of the state of South Carolina, in its opinion in this case, passed upon the federal question sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment."

Again in Hall v. Akers, 132 U. S. 554; 10 Sup. Ct. Rep. 171, Mr. Justice Blatchford, delivering the opinion of the court, says:

"In Murdock v. City of Memphis, 20 Wall. 590, 636, this court announced *** that, even assuming that a federal question was erroneously decided against the plaintiffs in error the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question; and that if that is found to be the case the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue. This principle has since been repeatedly applied."

See also Eustis et al. v. Bolles et al., 150 U. S. 362; 14 Sup. Ct. Rep. 131; Kennebec, etc., R. R. Co. v. Portland, etc., R. R. Co., 14 Wall. 23; Rector v. Ashley 6 Wall. 142;

Gibson v. Chouteau, 8 Wall. 314; Klinger v. Missouri, 13 Wall. 257.

Can it be said of these cases (1) that it affirmatively appears in the pleadings or the record that a federal question is presented or involved, (2) that it is necessary to the determination of these cases, and (3) that the judgment of the District Court could not have been given without deciding a federal question? Yet all these must be answered in the affirmative in order to give this court jurisdiction.

This court will not review the decision of a state court in an action at law upon a pure question of fact, although a federal question would or would not be presented, according to the way in which the question of fact was decided.

Dower v. Richards, 151 U. S. 658.

This court cannot proceed, in reviewing a state court, upon general ideas of the requirements of natural justice apart from the provisions of the constitution supposed to be involved.

New York & N. E. R. R. Co. v. Bristol, 151 U. S. 556.

VI. THE DEFENDANTS HAVE BEEN DENIED NO TITLE, RIGHT, PRIVILEGE OR IMMUNITY CONFERRED BY THE CONSTITUTION, OR ANY STATUTE OR TREATY OF THE UNITED STATES.

If these cases are against the directors in their individual capacities, and if the federal statute does not destroy the common-law action of deecit, then it follows that they do not involve the construction of a federal statute.

The only theory upon wihch such a contention would be based is that Section 5239 creates an immunity on behalf of the directors and exempts them from liability in all cases except those specifically named in the National Banking Act.

That such is not the effect of that act we think too clear to require further argument.

To give this court jurisdiction in these cases it must appear that the construction of a federal statute was necessarily involved in the decision of the state court and that its decision was against the claim of some title, right, privilege or immunity thereunder.

VII. THE DECISION IN BAILEY V. MOSHER, (63 FED. 488) WAS NOT A BAR TO THIS ACTION.

It appears that on October 27, 1893, Thomas Bailey filed in the District Court of Lancaster county, Nebraska, his petition against all the defendants in these cases, except Mr. Thompson (Bill pp. 258-268).

The action was removed to the Federal Court, where defendants filed a demurrer to plaintiffs petition which was sustained by the court and the case dismissed.

The grounds of the demurrer are: (1) The court has no jurisdiction of the subject matter. (2) The plaintiff has no legal capacity to sue. (3) There is a defect of parties plaintiff. (4) The petition does not state facts sufficient to constittue a cause of action in favor of plaintiff and against defendants. (Bill p. 273)

It is difficult to see how any of the grounds for the demurrer could operate as an adjudication, for, (1) If the federal court had no jurisdiction of the subject matter, that

would not bar plaintiff from bringing his action in a court which had jurisdiction. (2) If the plaintiff had no legal capacity to maintain that cause of action, it would not bar him from bringing an action he might sustain. (3) If there was in that suit a defect of parties plaintiff, it would not bar the bringing of another suit in which were was no such defect, and (4) If that petition did not allege a cause of action in the plaintiff, it would not bar a subsequent suit in which the petition did state a cause of action.

To constitute a judgment at bar to a future action, it must have been on the merits:

"It is * * * necessary, in order to support a plea of res judicata, that the former judgment should have been rendered upon the merits of the controversy; the plea cannot be based upon a judgment founded upon a lack of jurisdiction, a non-joinder or misjoinder of parties plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleading, or the like."

24 Am. & Eng. Enc. of Law, 2nd Ed., 794.

"A judgment upon a demurrer which is based upon formal or technical defects of a pleading, a lack of jurisdiction, a misjoinder of parties, or the like, as it does not involve the merits of the controversy, cannot be made available as res judicata." (id. pp. 798-9)

"The judgment must be upon the merits in a competent action, the plaintiff having sued in his proper character, and the pleadings having been correct. 'If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will must have been on the merits.

2 Black, Judgments, Section 693.

Again in discussing the meaning of the phrase "upon the merits," the same author says (Section 694):

"It is necessary that the ultimate right of action should have been in some way involved in the decision. **If the judgment goes off on an objection to the jurisdiction, or on a showing that the plaintiff has mistaken the from of action, or by reason of a defect of parties, or because the suit is premature, in any such case it needs no argument to show that the merits have not been reached.**. On the whole, then, we conclude that a judgment is 'upon the merits' when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions."

Id. Section 699. "It is a settled and inflexible rule that a judgment of nonsuit is not a judgment upon the merits, and therefore it is no bar to another suit upon the same cause of action."

If the present petition states a cause of action for deceit, the judgment and opinion in Bailey v. Mosher, supra, cannot amount to a declaration of the law as to the respective rights and duties of Mr. Bailey and the defendants in this case. If such a judgment be a bar it follows that a litigant who mistakes his remedy thereby loses his cause of action. The law is not so harsh nor exacting as to mere matters of form or procedure.

"If to a petition or pleading in an action a general demurer is interposed, and the pleading is determined defective for the want of material allegation, and a judgment follows, and in a second suit the material averment which the pleading in the first suit lacked is supplied, constituting the pleading sufficient as a statement of a cause of action, the

judgment in the first case is not a bar to the second suit, though both were instituted to obtain the enforcement of the same right."

State v. Cornell, 52 Neb. 25.

For the purpose of determining the effect of this judgment as a bar we must adopt the construction of the petition given it by the court as a basis of its decision.

As construed by the circuit court of appeals the petition in Bailey v. Mosher, ubi supra, was an action for malfeasance and misconduct in office resulting in injury to the bank and predicated on Section 5239 of the National Banking Act.

In the opinion Caldwell, J., says:

"The petition states a single cause of action, founded wholly on the alleged misfeasance and nonfeasance of the defendants in their capacities as officers and directors of a national bank. The alleged official misconduct of the defendants which is relied upon as stating the ground of action is particularly set out. It is alleged that they made false and misleading reports as to the condition of the bank to the Comptroller of the Currency; * * * that loans were made to persons in excess of the amount which could lawfully be loaned to anyone person; * * * that all these acts were violations of the National Banking Act, and of the duties of the defendants as officers and directors of the bank under that act, and the complaint concludes with the averment that, 'by reason of the several violations of the banking law as above set forth,' the defendants are liable to the plaintiff in the sum sued for. In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that his cause of action does not arise under a law of the United States. * * * (p. 491). The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank belonging equally to all the creditors in proportion to their respective claims and cannot be appropriated, in whole or in part, by a single creditor to the

exclusive payment of his own claim. * * * Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors."

It was insisted by the plaintiff in error that the petition in that case did not declare upon a violation of the National Banking Act but was an action for fraud and deceit, but the court expressly declined to adopt this view, remarking:

"But it is said that the plaintiff is not suing as a creditor of the bank, or for its mismanagement, but for the fraud and deceit practiced upon him through the defendant's reports to the Comptroller of the Currency, by which he alone was damaged. As we have seen the form of the petition will not support this contention. The motion to remand was properly overruled, and the **demurer to the petition rightly sustained, upon the ground that the plaintiff is not the proper party to sue for the cause of action stated in the complaint as we construe it."**

What that case decided, then, was, that Bailey could not maintain his suit against the directors for malfeasance, in violation of Section 5239 Rev. St., resulting in injury to the bank, because that would be an asset of the bank recoverable only by the receiver.

The opinion conceded, at least impliedly, that had the petition as construed, set forth an action for fraud and deceit, the demurer would have been overruled and the case remanded.

It is therefore apparent that there is an entire lack of identity in the two causes of action. In order that a judgment in one suit may be a bar to recovery in another it

must appear that the facts upon which the two causes of action are predicated are the same; that proof in the one would be the same as proof in the other.

Applying this test to these two causes of action, it must be obvious that evidence that would sustain a charge of malfeasance and misconduct in office, resulting in injury to the bank, would be wholly foreign to an action for deceit; and that, on the contrary, evidence that would sustain a charge of fraud and deception, practiced on a depositor, would clearly constitute no proof of malfeasance resulting in injury to the bank. Or, to use a concrete illustration, false representations to induce one to deposit his mony in the bank might cause great injury to the depositor, although not injure the bank, while embezzlement, or improvident loans, might injuriously affect the bank (for which it could maintain suit) yet not affect the depositor (for he could not be affected unless the injury to the bank was sufficient to cause its insolvency.)

In its essence the case of Bailey v. Mosher decides that Bailey was not the proper party to sue the directors for malfeasance in office in violation of Section 5239 resulting in injury to the bank. So, after all, the question of res judicata reduces itself to this—does his petition in this case set forth the common-law action of deceit?

If it does, there is no bar.

Conclusion.

We ask the indulgence of the court for the length our brief has assumed. We have felt throughout the discussion, that these cases do not present a question of which this court will assume jurisdiction, but, yet, for fear our

zeal may have caused us to err, we have presented our contention as to the merits.

In view of the repeated decisions of this court recognizing the existence of the common-law remedies in cases of similar character, and in view, further, of its opinions, often expressed, as to the duties and responsibilities of directors, we have no fear that the judgment of the Supreme court of Nebraska will be held too exacting, or as having established too high a standard of morality.

Directors occupy a most exalted position in the commercial and financial world. That position is one peculiarly adapted to deception and fraud, because the public cannot know the real truth concerning the corporation, but must rely solely on its directors.

The stability of the institution is based upon faith and confidence in its directorate, and the degree of accountability should be commensurate with the responsibility.

The directors are the only visible representatives of the corporation. Through them alone does it exercise its corporation function—through them alone is it known to the business world.

Shall it be said they may abdicate this function—this duty to **actually** and **actively manage**—and become mere "gilded ornaments," maintained to attract confiding customers as the candle attracts the moth?

To concede this would be a sad commentary on the eithics of commerce and the justness of the law.

Respectfully submitted,

JOHN J. THOMAS,
RICHARD S. NORVAL,
W. B. C. BROWN,
Attorneys for Defendants in Error.

Seward, Nebr., Dec. 22, 1907.